

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 KATHLEEN BROWN, :
4 Plaintiff :
5 v. : C.A. No. 03-224 (WDPA)
6 COST COMPANY, :
7 Defendant :

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10 Trial in the above-captioned matter held
11 on Thursday, June 9, 2005, commencing at
12 8:30 a.m., before the Honorable Sean J. McLaughlin,
13 Courtroom C, United States Courthouse, 617 State
14 Street, Erie, Pennsylvania 16501.

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16
17 For the Plaintiff:
18 Richard S. Matesic, Esquire
19 1007 Mount Royal Boulevard
20 Pittsburgh, PA 15223

21 For the Defendant:
22 Lawrence P. Lutz, Esquire
23 Michael J. Pawk, Esquire
24 Lutz & Pawk
25 The Morgan Center Building
 Suite 102, 101 E. Diamond Street
 Butler, PA 16001

 Reported by Janis L. Ferguson, RPR

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I N D E X

TESTIMONY OF GEORGIA PAWK

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1 (Whereupon the following discussion occurred on
2 the record in camera:)

3 THE COURT: Before we talk about this, let me
4 raise an issue here. You'll note in this draft charge, you
5 have two dates; July 31st and August 23rd. Now, it strikes
6 me that all you really need to be is turned down once in
7 order to get your damages.

8 Are we -- I guess this is for you,
9 Mr. Matesic. Are we going to go to the jury here or try to
10 go to the jury on two operative dates, or just the July 31st
11 date, where she showed up with whatever she showed up with?

12 MR. MATESIC: Just the July 31st date.

13 THE COURT: So we can take out that -- I think it
14 would be confusing. You could get everything you want with
15 one day. That's number one --

16 MR. MATESIC: Having said that, Your Honor, I
17 mean, our theory of the case is Ms. Brown, among other
18 women, were submitting these memoranda from spring through
19 summer to Cost; I'm available for a job.

20 THE COURT: Right.

21 MR. MATESIC: And at the time that those
22 memoranda -- on the day in which it was received, there may
23 not have been a job opening. But jobs did open up during
24 that time period. Cost had notice that there were available
25 people for work and jobs open on or about August 1st, on or

1 about August 14th, on or about August 18th.

2 THE COURT: But the circumstantial theory of your
3 case, based upon Barrett's testimony, is that it was more
4 likely than not, based on the practice, that there was a job
5 available on the 31st.

6 MR. MATESIC: Yes. And let's assume that Kathleen
7 Brown persuades the jury that she was there on the 31st.
8 Okay. She didn't get that job. Another job opened up on
9 the 14th. She didn't get that job. Another job opened up
10 on the 18th. She didn't get that job. So to the extent
11 that there were multiple openings during that time period
12 for which she did not receive an offer of employment,
13 those -- the dates of those vacancies --

14 THE COURT: Well, what do you want me to say,
15 then? On or after --

16 MR. MATESIC: On or after July 31st would cover
17 it.

18 MR. PAWK: I don't think that's proper, based on
19 the facts of this case, Judge. I mean, the clear testimony,
20 Kathleen Brown's own testimony, and all the witnesses he has
21 put on so far, is the labor -- the needs change on a daily
22 basis. I don't think you can say that, you know, a job --
23 if the jury believes that, in fact, there was available on
24 the three -- I don't think the evidence shows that. That
25 all of a sudden they had some duty, had to prove there's

1 some duty or obligation to keep her name and when a job
2 opens, hire her over someone else on the job and that those
3 needs remain open. The labor needs change on a daily basis.
4 They don't keep any records --

5 THE COURT: We'll come back and fine-tune this in
6 a second. First let's go to Plaintiff's counsel here.

7 Have you had a chance to go through my draft
8 charge?

9 MR. MATESIC: I have, Your Honor.

10 THE COURT: Do you want to talk to me; issues,
11 questions, concerns. Then we'll talk to the other side.

12 MR. MATESIC: The first deals with the Court's
13 articulation of the prima facie case. Now, the fact --
14 well, there are four elements in the case, and the fourth
15 one, that there is a job -- that the employer continued to
16 seek applicants on or after the date upon which this
17 qualified individual presented herself for employment.

18 THE COURT: All right. Which I guess is omitted
19 from my charge.

20 MR. MATESIC: It is omitted from the charge.

21 THE COURT: Let me tell you what I also omitted
22 from this. Because when I went back and looked at it again,
23 here is the monkey wrench in this thing. It seems to me
24 that the Defendant's position is insofar as a laborer's
25 position is involved, is that she did not apply for a

1 laborer's position. Application is one of the constituent
2 elements under the prima facie case.

3 MR. PAWK: Right.

4 THE COURT: Yet, your legitimate nondiscriminatory
5 reason, standing alone, is really she applied for an
6 operator's position, not a laborer's position. So what I
7 did with -- and I want to see if I get acquiescence on all
8 counsel -- I lifted the application out of the prima facie
9 case, and I put it in your legitimate nondiscriminatory
10 reason.

11 MR. MATESIC: And that's actually a problem that
12 we have here. Because we're merging now these various legal
13 standards --

14 THE COURT: What would you suggest that I do?

15 MR. MATESIC: What I would suggest that we do is
16 we follow from McDonnell Douglas case the four elements of
17 the prima facie case, and we have quoted the language at
18 Paragraph 6 of our proposed charge. And then the
19 standard --

20 THE COURT: Do you want me to refine it to say a
21 laborer position? Because that's the theory of your case.

22 MR. MATESIC: That's fine, yes. Because the
23 laborer's position is our case.

24 MR. LUTZ: I'll get into that in ours, because we
25 have a problem with that.

1 THE COURT: So I lay out the four points. Now I
2 tell them that certain of them are satisfied, with the
3 exception of -- which point would it be?

4 MR. MATESIC: Well, under 2, that -- well, that
5 she applied and -- No. 2 is that she applied and was
6 qualified for a job for which the employer was seeking
7 applicants.

8 THE COURT: There's a dispute as to whether she
9 applied for a laborer's job.

10 MR. MATESIC: There is a dispute. No. 3, despite
11 her qualifications, she was rejected.

12 THE COURT: No question about that.

13 MR. MATESIC: 4, after her rejection, the position
14 remained open, and the employer continued to seek applicants
15 from persons with the Plaintiff's qualifications.

16 THE COURT: Well, is there a dispute about that?
17 That goes to -- the problem is -- it's not a problem. It's
18 the way the thing is set up. That suggests that after her
19 application, the position, I guess, in this case
20 occasionally would pop open. I mean, is there really a
21 dispute that throughout the balance of this job, on
22 occasion, laborers were being hired?

23 MR. PAWK: There's not a dispute of that. No,
24 Judge. But I guess it's hard to, you know, explain. Our
25 position is that there was no job available on the 31st. So

1 you can't say that it was -- it remained open, if there was
2 no job available. But there is no dispute that -- I think
3 the record is clear, there were three hires after the 31st.

4 THE COURT: Right.

5 MR. MATESIC: On or after the 31st.

6 THE COURT: Well, whatever. But -- so that -- I
7 guess that prong isn't in dispute. But implicit in the
8 application prong, where it says the person applied,
9 implicit in that prong is the concept that there had to have
10 been a job to apply for. So it seems --

11 MR. MATESIC: And it's her burden.

12 MR. PAWK: That's right.

13 THE COURT: So don't you think what I should tell
14 the jury is you have to determine whether she applied for
15 the labor position --

16 MR. MATESIC: Yes.

17 THE COURT: And you have to determine, when she
18 applied for the labor position, whether there was a labor
19 position available.

20 MR. MATESIC: Well, no. No, no. That she
21 applied -- actually, it's not -- and this is not parsing the
22 language.

23 THE COURT: All right.

24 MR. MATESIC: It's not whether a job was open.
25 The standard is whether it was a job for which the employer

1 was seeking applicants. Okay? Cost knows, because it's
2 been in business for a long time, that during the peak
3 season, openings happen, because their needs, as Mr. Pawk
4 has just said, change on a daily basis. So Cost is
5 continually receiving applications.

6 THE COURT: Right.

7 MR. MATESIC: With full knowledge that during the
8 peak months of the summertime, they are going to have needs
9 on this day, maybe a week after that day, maybe two weeks
10 after that day.

11 So what the second prong in the prima facie
12 case says is -- or it goes to is whether or not the employer
13 is seeking applications for a job. Okay? What is the job?
14 The job is mason tender. Were they seeking applications
15 during the summer months of 2002? And the answer is,
16 actually, they were getting them from the springtime of
17 2002.

18 We went through, for 20 minutes, through all
19 those minority memoranda that Miss Pawk has kept on file.

20 THE COURT: What page are your --

21 MR. MATESIC: Page No. 3, Paragraph 6.

22 MR. PAWK: Judge, I want to address what
23 Mr. Matesic is saying now about this. Because we're going
24 to get into a big objection, and I'd like to address it now.

25 He has asked Georgia Pawk about EEO

1 memorandums that were filled out by minorities in
2 Charleston, West Virginia, in a project they were doing in
3 Charleston, West Virginia. That's what he asked her about,
4 in April and May of 2002. Nothing to do with this job at
5 all. So he wants to show they were receiving applications
6 from minorities in Charleston, West Virginia in April and
7 May of 2002, and so they were actively seeking these
8 applications.

9 It's just not true, Judge. It's going to
10 confuse the jury, and it's not proper.

11 MR. MATESIC: You don't dispute what Kathleen
12 said, that you were hiring bricklayers from Illinois, West
13 Virginia, Florida. You were going all over the United
14 States, and Cost was bringing them in from everywhere.

15 THE COURT: I think I can clarify this. I'm
16 looking at the McDonnell Douglas language. That she applied
17 and was qualified for a job for which the employer was
18 seeking applicants.

19 Is it your position that you don't have to
20 demonstrate, circumstantially, as you attempted to do, that
21 there was a position available on that day if they would
22 have chosen to hire her?

23 MR. MATESIC: I'm saying that there is a -- when
24 they say a job in McDonnell Douglas, what they refer to
25 is -- that concept is expansive. It includes a job on that

1 day, it includes that job title. And in these circumstances
2 with Cost, mason tender, the job of mason tender was open on
3 all of these days in the summertime; July 31st, August 14th,
4 August 19th. And actually there were 17 other occasions or
5 14 other occasions before July 31st.

6 So she meets the second prong of the test if
7 she shows that on or after July 31st, one or more instances
8 occurred where Cost was seeking a mason tender. She gave
9 them notice. She put -- you know, employers always do this.
10 They say --

11 THE COURT: Hang on a second. If she's seeking
12 it, though -- if they were seeking a mason tender, that
13 means a mason tender's job was available. Right?

14 MR. MATESIC: Right. Let me answer it this way:
15 You know, the standard line in an employer's rejection
16 letter is we have decided to choose somebody else, but we
17 will keep your application on file.

18 THE COURT: Yeah, right.

19 MR. MATESIC: For further consideration. I'm
20 going to ask Georgia Pawk that question; you kept these on
21 file for further consideration, right?

22 THE COURT: All right.

23 MR. MATESIC: Now, how is she going to answer that
24 question? Yes, that's what I did. I kept them on file for
25 further consideration. What does that mean? That means we

1 satisfied the second prong.

2 MR. LUTZ: He's ignoring a lot of things. He's
3 ignoring what his witnesses, own witnesses brought up,
4 Mr. Barrett in particular, that the union availability
5 changes from day to day. So to say that there is a job
6 available for someone off the street on a daily basis is
7 just totally contradictory to what Kathleen Brown and Ron
8 Barrett said from the witness stand. They said it changes
9 on a daily basis. There is no continuing obligation with
10 Cost.

11 Also, the people that show up at the job site
12 are the ones who get hired. That's what she said on the
13 witness stand. She didn't show up on the job site on
14 subsequent days. She didn't put a phone number on this
15 document that they sent to her. How on earth were they ever
16 even going to get in touch with her?

17 THE COURT: I think the fundamental question is
18 whether or not -- your theory is that once they had her
19 application, physically had her application, once she came
20 to the job site, she was in a continuous application mode,
21 even though she wasn't there.

22 MR. MATESIC: Right.

23 THE COURT: Is that what you're --

24 MR. MATESIC: And I have a document where I can
25 show -- where I can support exactly what I'm saying, and

1 it's their document, and he's going to get it for me.

2 MR. PAWK: What is it?

3 MR. MATESIC: The affirmative action program
4 document that Georgia wrote. Okay. Now, this is
5 Defendant's Exhibit U-1. Now, I am totally mindful of our
6 discussions over the last day or so concerning these
7 percentages, 6.9 percent and how the Judge -- how the Court
8 is mindful of the fact of how prejudicial this could be to
9 the case and should not be sent to the jury. This is
10 Georgia Pawk's own document.

11 Mike, do you have this?

12 MR. PAWK: Not in front of me.

13 MR. MATESIC: This is U-32, the Defendant's
14 exhibit. That's the second page of the exhibit titled
15 Affirmative Action Plan, under the letterhead Cost Company.
16 And Miss Pawk will adopt -- I believe she has already
17 adopted --

18 THE COURT: Let me see the operative language that
19 you are talking about.

20 MR. MATESIC: The operative language is Paragraph
21 10.

22 THE COURT: Let me read it. It says the contract
23 for equal employment opportunity goal is 50 percent. The
24 female employment goal is 6 9/10 percent. Okay?

25 MR. MATESIC: Now, we're not talking about the

1 regulation. Okay? The CFR is off the table right now.
2 We're just talking about Cost's own internal policy. We're
3 talking about Cost's contractual obligations. Forget about
4 the law. Forget about the CFR. This is the goal of the
5 equal --

6 THE COURT: I can't forget about the law.

7 MR. MATESIC: But I'm not arguing --

8 THE COURT: That's the position I find myself in.

9 MR. MATESIC: I'm sorry. But I'm not arguing the
10 law right now. What I'm saying is Miss Pawk is the Equal
11 Employment Officer, has -- she has created this policy for
12 Cost, and these are the goals. This is her goal. Forget
13 about the law. This is what she says the goal is under
14 their own policy. All right?

15 Now, if the goal is under their own policy --
16 it's a fair question to ask Ms. Pawk -- what steps do you
17 take to achieve your goals, I don't think anybody can say
18 that's an unfair question; what steps do you take to achieve
19 your goals.

20 Another question for Miss Pawk is, what --
21 what methods do you use to determine whether you have met
22 your goals. That has to be a fair question.

23 THE COURT: Let me interrupt just for a second.
24 The critical question is, it seems to me, what is
25 necessary -- what -- what must one do as a walk-on to get

1 hired at Cost. In other words, what -- what is the
2 application that will get you in the door. And the question
3 is, it seems to me, does it, in fact, require that you do
4 what your client did on the 31st, if the jury were to
5 believe that, and that means physically show up at the door
6 to be hired. I mean, is there anything in the record which
7 suggests that walk-ons get hired, other than being at the --
8 at the trailer on the day that they are hiring?

9 MR. LUTZ: There's nothing.

10 MR. MATESIC: As of now. And that's exactly my
11 point.

12 MR. PAWK: Judge, can I address that?

13 THE COURT: Let him finish, and then I'll let you
14 go.

15 MR. MATESIC: If this is really their goal,
16 there's more than one way to skin a cat. You can hire
17 people off the street who show up. You have an objective in
18 a business to get that project done in a certain amount of
19 time. You have needs. They arise on a daily basis. We
20 have to put somebody in there immediately so the project can
21 continue.

22 On the other hand, you also have a goal, as
23 stated in Paragraph 10, that you're going to pursue equal
24 employment.

25 Now, those two goals sometimes clash. There

1 are occasions when one of those goals trumps the other.
2 Okay? And if that happens, if -- and -- okay, well, let me
3 put it to you this way: If, for example, Miss Pawk, as the
4 Equal Employment Officer, believes that this is more
5 important, that Paragraph 10's goal is more important than
6 putting a person in that job immediately, okay, she can tell
7 us why she thinks that's more important.

8 And to go right back to your point, that
9 means maybe -- maybe Cost's Equal Employment Officer would
10 say, well, we -- we're not just going to make jobs available
11 to people who walk in off the street. Because we have this
12 goal of hiring 6.9 percent females. Because we have this as
13 a goal, we're going to keep a job open so that I have enough
14 time to call one of those 30 people, 30, 35 people who sent
15 me their Minority Recruitment Memoranda in the spring, and
16 say, can you be in Erie -- can you be in Forest County
17 tomorrow, can you be there the day after tomorrow.

18 THE COURT: See, here --

19 MR. MATESIC: This is my goal.

20 THE COURT: Here is my point: If she was
21 discriminated against on the 31st, you have won. All of
22 this other stuff is irrelevant. You won.

23 MR. MATESIC: Well -- but how do I prove -- and
24 you're exactly right. And how do I prove that she was
25 discriminated against? Pretext. How do I prove pretext? I

1 show that Georgia Pawk is talking out the side of her mouth.
2 That is my burden.

3 THE COURT: What do you want to say on this? And
4 then I'm going to rule, because we have got to get moving.

5 MR. LUTZ: This is really hard, to deal with a
6 moving target constantly. The first document came into
7 evidence with respect -- this recruitment memoranda says --
8 and I don't have it in front of me, Your Honor, but my
9 recollection is it talks very vaguely about what the process
10 is and how this is not an application, there may be
11 possibility in the future.

12 When you read all these documents together,
13 there is no way on earth that there -- it even remotely
14 creates any obligation on some employer. He's trying to get
15 into the EEOC items that he knows he's restricted from
16 getting into. He's trying to throw all these documents in
17 front of a jury and somehow insinuate to the jury that Cost
18 isn't doing what it has to do with respect to minorities.

19 THE COURT: All right. Let me solve the prima
20 facie case problem first. All right. Let's say I'm going
21 to give the prima facie's charge just as it appears in
22 McDonnell Douglas --

23 (Discussion held off the record.)

24 THE COURT: And so that she applied and was
25 qualified for a job which the employer was seeking

1 applicants. I'm going to tell the jury with respect to that
2 particular prong that -- what was your point about labor
3 position? You want me to say labor position?

4 MR. LUTZ: I think you just say "hire" throughout.

5 THE COURT: Say what?

6 MR. LUTZ: Well, I'm just looking at your charge.

7 THE COURT: And I would just leave it position
8 rather than --

9 MR. LUTZ: For a job.

10 THE COURT: That she applied and was qualified for
11 a job for which the employer -- and in that respect, don't I
12 have to tell the jury that there is a dispute on
13 application?

14 MR. LUTZ: Yes. Whether or not she applied.

15 MR. MATESIC: You know, Your Honor, I don't think
16 you have to say there's a dispute. You have to say it's her
17 burden to prove it.

18 THE COURT: You know, I got to tell you guys --
19 and this isn't your fault. It just may be the way the case
20 is shaking out. But I have done hundreds of Title VII
21 cases, and I have never seen one get more convoluted in my
22 life than this thing has. And I started out with a -- with
23 a view that this was a rather straight walk to the goal
24 line.

25 I think the jury -- I think the jury in the

1 prima facie case is going to have to be told this: That 1
2 is established. With respect to No. 2, that the jury is
3 going to -- if the jury -- you have abandoned your
4 operator/engineer theory.

5 MR. MATESIC: Yes.

6 THE COURT: You are going only on a laborer's
7 theory. So I don't see the harm in the jury being told
8 that.

9 MR. LUTZ: Because she doesn't think she ever
10 applied for a laborer's --

11 THE COURT: But that's her burden. Her burden is
12 to establish that she applied for a laborer's position. And
13 I'm going to tell the jury that in so many words, there's a
14 factual dispute there. They are going to have to, A,
15 determine whether she applied for a laborer's position, and,
16 B, they are going to have to determine whether there was a
17 position available.

18 MR. PAWK: Right.

19 THE COURT: So with respect to No. 2, not unlike
20 what I think may have been in my charge already, I'm going
21 to say that they are going to have to determine whether she
22 applied for the laborer's position, whether one was
23 available, and the qualifications is a given. There is no
24 doubt she was qualified for that position. And, 4, after
25 her rejection, the position remained open and the

1 employer -- I mean, I will give that, but I just don't think
2 it's germane to the case. If you want me to give it, I
3 will, but I just don't think it's -- I don't think it's in
4 dispute. I'll give it -- I'll tell them it's not in dispute
5 that a position remained open.

6 MR. MATESIC: If they are agreeable to that.

7 MR. PAWK: I like that you left it out in your
8 original charge.

9 THE COURT: I mean, it doesn't do you one whit of
10 harm for you to leave it out, so it's one less thing you
11 have to prove, so I'm inclined to leave it out. In other
12 words, we'll just end up with "and rejected". Do you follow
13 me?

14 MR. MATESIC: Okay. And I'm just wondering,
15 though, in the event that this ends up somewhere else, is it
16 going to be a problem that we didn't include all four
17 elements as stated under the Green case? And you know my
18 tendency is always just get the language out of the case and
19 stick it in the charge. But if they are agreeable to it and
20 I'm agreeable to it --

21 THE COURT: I don't see it as being -- this is not
22 one of those plain air type of situations. I mean, I think
23 it --

24 MR. PAWK: We -- I'll state on the record, we
25 agree with Your Honor's draft where you left the fourth

1 element out, and we would agree with that.

2 THE COURT: All right. Well, then haven't we come
3 full circle to the point where at least insofar as the prima
4 facie case is set up, that there's no disagreement?

5 MR. PAWK: I have one comment.

6 THE COURT: You finish off, and I'll go over to
7 the Defendant. Go ahead, Mr. Matesic.

8 MR. MATESIC: I have reconsidered this. I object
9 to not including the element. I understand that it helps us
10 and there's no downside to it, but, in fact, that language,
11 reading that language to the jury --

12 THE COURT: You know when you said if this case
13 ever goes someplace else, it might, but we won't have a
14 record, so slow down when you're talking.

15 MR. MATESIC: When the Court reads the charge,
16 there's always this possibility that just the reading of the
17 charge, the language itself, is going to make an impression
18 on the jury. So the jury is going to be thinking about
19 these issues.

20 THE COURT: I hope so.

21 MR. MATESIC: And it may be helpful to my client
22 that they be thinking about the issues of rejection and of a
23 position remaining open and the continuing --

24 THE COURT: All right. I'll give it. We'll put
25 it in. But then what do I tell the jury about it? Because

1 when I say after rejection, the position remained open, that
2 suggests that it was open at the time she applied for it.

3 MR. MATESIC: Well, that's her burden to show that
4 it was open.

5 THE COURT: All right. Then I'll say she will
6 have to -- fine. So we got that done.

7 Now, with -- let's just finish off the
8 Fuentes burden shifting here. Do you have any objection to
9 my articulation of the Defendant's --

10 MR. MATESIC: That they have articulated a
11 legitimate reason?

12 THE COURT: Yes.

13 MR. MATESIC: I don't.

14 THE COURT: Now let me flip over to you.

15 MR. PAWK: Judge, I would suggest we add a
16 sentence after you complete the prima facie charge there.
17 You say, if you conclude that a labor position was available
18 when Brown applied, you must then determine whether she was
19 discriminated against because of her sex. I think to be
20 fair, because we don't believe she has proven a prima facie
21 case, that you need to say if you conclude that she failed
22 to prove that a labor position was available, and that --
23 did you find that the --

24 THE COURT: The sentence should be, if you find
25 that Miss Brown failed to prove that she applied for a

1 laborer's position, or that a laborer's position was
2 available, then you must find in favor of the Defendant.

3 MR. PAWK: Correct. I think you need to add that,
4 and it need go no further.

5 THE COURT: I think that that's correct. You
6 agree with that, don't you, Mr. Matesic? In other words, if
7 a prima facie case hasn't been made out.

8 MR. MATESIC: Yes, that's fine.

9 MR. LUTZ: My earlier comments were with respect
10 to that laborer thing. But if you go to Page 8, Your Honor,
11 you say at the end of the first paragraph -- I'd like to
12 rephrase that a little bit. The last sentence says,
13 "Therefore, in terms of a prima facie case, you need only
14 decide whether a laborer's position was available."

15 I would like it to say if and when Brown
16 sought employment, because this is still talking about a
17 prima facie case.

18 THE COURT: That has to be changed because you're
19 going to have a -- we're going to have the fourth element as
20 well, which is the position remained open.

21 MR. PAWK: Are we dropping the August 23 date as
22 well, Judge?

23 THE COURT: Yes, we are. Okay. What else?

24 MR. LUTZ: And, well, the second paragraph it was
25 the same type of comments. "You concluded the position that

1 Brown sought was available when Brown sought that position,"
2 is the sentence.

3 MR. MATESIC: Where are you?

4 THE CLERK: The paragraph you just changed, Judge.
5 That would be reworded, because the charge is going to be
6 reworded in that place. I'm sorry, where you just dictated
7 this change, "If you find that Brown failed to prove she
8 applied and/or that a position was open, then you must find
9 for Cost."

10 THE COURT: Right.

11 THE CLERK: So he was saying change this, and I
12 said you already did.

13 THE COURT: All right.

14 MR. LUTZ: At the very bottom of that page, it
15 says, "Cost further contends that there were no operator
16 positions." I'd like it to say that Cost further contends
17 that there were neither laborer, nor operator positions
18 available at the time of Brown's -- at the time Brown was
19 seeking employment.

20 MR. MATESIC: What are you suggesting, Larry? I
21 apologize. That there were no --

22 THE COURT: At the bottom of Page 10, that there
23 were neither operator positions nor laborer positions.

24 MR. MATESIC: This is Page 8?

25 MR. LUTZ: 8.

1 MR. MATESIC: I thought you said 10.

2 MR. LUTZ: Do you want us to get into the damages
3 part?

4 MR. MATESIC: Before you do, Your Honor, we
5 started off with my objections --

6 THE COURT: I'm going to come back and let you go
7 all the way through yours.

8 MR. LUTZ: Page 12, Paragraph A, with respect to
9 back pay. The appropriate nature of back -- the appropriate
10 measure of back pay is the amount of salary, plus fringe
11 benefits that Brown would have received, and you have
12 blanks.

13 I would propose we say it this way: From the
14 date she was not hired by Cost until she obtained subsequent
15 employment at a higher rate of pay or until the time she
16 would have been laid off by Cost.

17 THE COURT: I thought there was an agreement on
18 what those dates would be. Wasn't it July 31st to August --
19 when did she get her next job?

20 MR. MATESIC: She got a job that paid less in
21 November.

22 MR. PAWK: No, she was working in October --

23 THE COURT: When did she get a job that paid as
24 much or more?

25 MR. MATESIC: April of '03.

1 MR. LUTZ: November. Because he tried to factor
2 in that pension stuff that made it less. But it was obvious
3 from the testimony that the pension stuff doesn't come in,
4 because she wouldn't have qualified at that time. So when
5 she got the job at KGL, she was making more than she did at
6 Cost Company. So you can't put in an open date there.

7 MR. MATESIC: That's not -- we have a conflict in
8 the evidence on this.

9 THE COURT: Isn't this the way to do this -- it
10 would be -- this is the way to do it: Because the jury is
11 then told in the next paragraph, from the amount of money
12 that she was told she would have earned, you have to deduct
13 the money she received from another employer. So let them
14 do that. So back pay would run from July 31st to the
15 present.

16 MR. MATESIC: Any money she received, I have an
17 objection to that, because the per diem, as Ms. Brown
18 testified to, was paid to her to compensate her for
19 additional expenses that she would not have incurred had she
20 been working at Marienville. So it really does not factor
21 into this motion of pay.

22 THE COURT: But I don't say anything about it.

23 MR. MATESIC: What is that?

24 THE COURT: I don't say anything about per diem.

25 MR. MATESIC: You say "any money". And any money,

1 in construction, that's --

2 THE COURT: You know, everybody was talking about
3 per diem out there and asking questions, like it was an
4 unknown term from the planet Mars. Per diem is not salary.
5 It is money intended to compensate you for out-of-pocket
6 expenses that you otherwise would not have incurred.

7 MR. MATESIC: I agree with that. They disagree
8 with it.

9 THE COURT: Don't you think?

10 MR. LUTZ: It's money that she received in
11 connection with this job. It's a fringe benefit, clearly,
12 to a job. I mean, people have expenses, living and eating
13 expenses --

14 THE COURT: I'm not going to overly parse this for
15 the jury. You can say whatever you want on that. I am
16 going to say whatever she would have received from July 31st
17 to the present. The jury can calculate whatever they want,
18 if they think there should be deductions or offsets. I'm
19 not going to lock into a date, because back pay can run up
20 to today.

21 MR. MATESIC: My objection is to "any money", as
22 opposed to any wages that she would have earned from another
23 employer in Marienville.

24 MR. LUTZ: Why, if you say benefits with respect
25 to the Cost position, you have to say benefits with respect

1 to any other position.

2 THE COURT: That's how I am going to charge it, so
3 keep going.

4 MR. PAWK: Punitive damage, Judge, I don't believe
5 there has been evidence sufficient in this case to charge
6 this jury on punitive damages.

7 THE COURT: I haven't finished hearing the
8 testimony.

9 MR. PAWK: Judge, I asked for in my request a
10 charge, the standard charge for failure to call available
11 witnesses, and I think the testimony in this case is, since
12 she's putting hearsay as to people who told her that Cost
13 was hiring -- and it goes to a key element in the case, and
14 I know you have given an instruction to the jury that they
15 at least couldn't consider Mandy's testimony --

16 THE COURT: Some of it came in over no objection.

17 MR. PAWK: I think she said something when I was
18 cross-examining her.

19 THE COURT: From other people.

20 MR. PAWK: I should be able to argue to these
21 people, these are her friends, Mandy is her best friend.
22 This is John Howard and Kenny Popini were working on the
23 project. Wouldn't they be the best people to support her
24 statement that there was an available job, and Cost was
25 hiring, I would at least like to argue that to the jury. I

1 think that's a proper charge.

2 MR. MATESIC: Obviously, I would object to saying
3 she didn't call available witnesses. The only evidence --
4 we put that evidence to the jury to show there was
5 reasonable mind, not to prove that there was a job
6 available. The Court instructed the jury accordingly --

7 THE COURT: I don't think it's appropriate to give
8 a missing witness charge on that. For a variety of reasons.
9 And I have to look at the rule again. What are you --

10 MR. PAWK: Well, it's not a missing witness. It's
11 failure to call available witnesses.

12 THE COURT: Let me see the thing on that. Those
13 witnesses would be equally available to you, would they not?

14 MR. PAWK: True. But, I mean, I didn't -- I
15 wasn't -- I wasn't proffering those people's names in
16 evidence that they were supporting my testimony. She was.

17 THE COURT: I understand that, but I don't think
18 the shoe fits here, so I'm not going to let you give that.
19 What else?

20 MR. PAWK: Judge, if I can say, so I can avoid an
21 objection, I'm free to argue who she called and didn't call
22 in my closing.

23 THE COURT: But you can't argue -- you can't
24 argue, for instance, that if those other people would have
25 been produced, the people that she testified to, made those

1 statements, that --

2 MR. PAWK: You can draw an inference that it could
3 have been adverse. I won't say that, but I can talk about
4 people she named. I just don't want to revisit this later.

5 THE COURT: Right. You can't do it in such a way
6 that you are drawing an adverse inference about their
7 veracity.

8 MR. MATESIC: And you're not going to question the
9 fact that she didn't call these people?

10 MR. PAWK: Yeah, I am.

11 MR. MATESIC: Why didn't she call these people?

12 MR. PAWK: I'm going to talk about who she called
13 as witnesses and what evidence was presented, and I'm going
14 to say you heard her testify that her best friend Mandy
15 lived there, and you heard her say that this is how she knew
16 people were -- that Cost was hiring, and Kenny Popini was
17 working on the job, and did she bring -- present any of
18 these people in here to tell you anything --

19 THE COURT: No, you're not. That's the same thing
20 I just told you not to do.

21 MR. PAWK: I wouldn't take the next step and tell
22 you the failure to call them would be adverse.

23 THE COURT: When the issue first came up, just to
24 put this in perspective, there was an objection from you,
25 and I think it might have been somebody in a bar. I can't

1 remember who they were. You objected, and said, no, I'm not
2 doing it for the truth of the matter asserted. I'm doing it
3 for why she went to the job site to seek employment. I gave
4 a jury instruction on that.

5 On two or three occasions, testimony was
6 elicited from her that someone else had said that there -- a
7 different group had said that they were hiring. I can't
8 remember who they were. That came in over no objection.
9 Then you were cross-examining her, and she went off again.
10 So, you know, I gave a curative instruction to the jury when
11 an objection was made with respect to a distinct group.

12 What I'm saying is, it sounds to me, if I
13 remember correctly, that some hearsay came in over no
14 objection.

15 MR. PAWK: Well, I apologize, Judge, because I was
16 sitting there with Larry at the time when she then -- she
17 first said about Mandy. That was at the Kelly Hotel. And
18 we objected, and you gave a curative instruction. Then she
19 took the next step and talked about Kenny Popini and John
20 Howard. I didn't keep objecting because I thought your
21 curative instruction was going to all those people.

22 THE COURT: I was assuming that was it. With
23 respect to any of these groups of people that you were
24 eliciting the testimony from, just like the first group, I
25 was working under the impression that it was your position

1 that that was all state-of-mind testimony all the way
2 through.

3 MR. MATESIC: Yes.

4 THE COURT: All right. Then that curative
5 instruction that I gave the jury would apply for all of
6 those folks. All right. Let's go back to you, then.

7 MR. MATESIC: All right. All right. This is Page
8 9. And I am mindful at this point of the Third Circuit case
9 of Smith versus Borough of Wilkinsburg, 148 F.3d., 272, 1998
10 case. It was issued five years after the Supreme Court's
11 decision in St. Marys Honor Center versus Hicks, 09 U.S.
12 1993. Several observations that the Court made before it
13 announced the standard when instructing a jury as to
14 pretext. And I'm going to read from the decision, in the
15 field of employment discrimination --

16 THE COURT: Please go slower. Just give the case
17 to me and point me to where the operative language is.

18 MR. MATESIC: The operative language is this
19 portion underlined here.

20 THE COURT: If the Plaintiff establishes the
21 elements of a prima facie case, the employer must articulate
22 a particular -- once such a justification is proffered, the
23 burden then reverts to the Plaintiff to prove that the
24 articulated reason is pretext. When a jury finds that the
25 proffer is justified for its action, the jury is permitted,

1 albeit not mandated, to return a verdict in its favor.

2 MR. MATESIC: Correct. You say that later in the
3 charge. I don't mean to be disrespectful. That's not how
4 the Court addresses this issue in the first instance in the
5 instructions.

6 THE COURT: All right.

7 MR. MATESIC: What the Court says is, "Brown
8 cannot prove intentional --" this is the middle of the first
9 paragraph. "Brown cannot prove intentional discrimination
10 by Cost simply by showing that its stated reason is false.
11 Rather, Brown must show both that the stated reason is false
12 and that the real reason for the challenged decision was
13 because of her sex." Okay?

14 The Court in Smith versus Wilkinsburg
15 articulates this standard in a different way than the Court
16 in our case has articulated the standard. The Court has
17 said it is not spoken in unequivocal terms, as the Court in
18 the present proposed charge has. The Court uses the
19 terminology, "Brown must show both that the stated reason is
20 false and that the real reason for the challenged employment
21 decision was because of her sex."

22 THE COURT: That's an accurate statement of the
23 law.

24 MR. MATESIC: Okay. But what the Court is saying
25 here is that once pretext -- once they disbelieve -- once

1 they disbelieve what the employer is saying, then they --
2 all that is left for the jury to do is to decide whether or
3 not it was discrimination.

4 THE COURT: Okay.

5 MR. MATESIC: What the Court suggests here in this
6 statement is there is a burden over and above that. And the
7 burden is that the reason for the challenged employment
8 decision was because of her sex. This -- this suggests to
9 the jury that Ms. Brown has a higher hill to climb than
10 the --

11 THE COURT: I disagree. I'm leaving it the way it
12 is. It's accurate in my view. What else?

13 MR. MATESIC: My only objection for the record is
14 that this comes -- that the language on Page 9 precedes the
15 statement of the law on Page 10. So my objection, for the
16 record, is that we take out No. 9 and use that language from
17 Page 10, which is the second full paragraph.

18 THE COURT: All right. What else?

19 MR. MATESIC: Okay. The Court talks about the
20 "but for" test. But for discrimination. And I apologize, I
21 do not have a case citation for the Court. But I -- and I
22 believe that the proper terminology is determinative factor,
23 not "but for".

24 MR. PAWK: What page are you on?

25 MR. MATESIC: We are on Page -- this is Page No.

1 10 at the very bottom.

2 THE COURT: Okay. Let's see.

3 MR. MATESIC: "Brown must prove that but for her
4 sex, this decision and event would not have occurred."

5 I believe the Court uses the determinative --

6 THE COURT: So do I. Read on. Read the last
7 sentence of Page 10, onto 11. I just define what it means
8 by saying it's -- I'm not going to change that. What else?

9 MR. MATESIC: Then the paragraph immediately above
10 that, "If after considering --"

11 THE COURT: I'm sorry; what page are you on?

12 MR. MATESIC: We're still on Page 10. I would
13 suggest that we add at the end of the second paragraph, this
14 is because your disbelief of Cost's stated reason, when
15 added to Brown's establishment of the prima facie case is
16 enough evidence --

17 THE COURT: No. I'm not going to give that.

18 MR. MATESIC: All right. Note my objection for
19 the record.

20 THE COURT: What else?

21 MR. MATESIC: Let's see. One more thing. Give me
22 one second, Your Honor. On Page 13, under Punitive Damages,
23 this is under Paragraph C, second sentence, if you find --
24 well, if you find that the Defendant's violation of Title
25 VII was willful, the Court will award Brown money damages.

1 And I believe that the proper instruction is that the
2 jury -- you, the jury, are to award punitive damages, not
3 the Court.

4 THE COURT: Well, remember, though, the punitive
5 damages here -- I think we're talking about a statutory --
6 we're under the Civil Rights Act of 1990, are we not, or
7 1991?

8 MR. MATESIC: '91, yes.

9 THE COURT: Isn't that a doubling -- I mean, this
10 is not an open-field punitive damage award. If I remember
11 correctly, this is a statutory -- the statute itself speaks
12 of a doubling of, I think, of the compensatory award, does
13 it not?

14 MR. MATESIC: Well, but it doesn't preclude the
15 jury from doubling.

16 THE COURT: Actually, I was trying to make it less
17 complicated, because if they find willful misconduct, I
18 would simply mold the verdict by performing the appropriate
19 arithmetic to give you the award.

20 MR. MATESIC: But -- okay. But why tell the jury
21 that? I mean --

22 MR. PAWK: Maybe I can simplify this. I brought
23 up the issue of punitives earlier. I don't even think it's
24 proper to charge the jury on punitives at this point. So
25 maybe we can revisit this.

1 THE COURT: What, do you want the jury to do the
2 multiplication? But then I have got to charge them on how
3 they do it. You will lose not one bit by this. If they
4 find it's willful, I will perform the math for you, and I
5 will give you whatever the multiplication comes out to be.
6 Otherwise, I have got to go in and charge them on you have
7 got to multiply -- it's just an unnecessary step.

8 MR. MATESIC: Let me ask the question this way:
9 What in this instruction tells the jury -- because it seems
10 to be confusing. The first sentence says you must decide as
11 a part of the Plaintiff's damages, and if you find the
12 violation was willful, the Court will award Brown money
13 damages. That suggests to the jury that the calculation of
14 that is taken out of their hands and put into the hands of
15 the Judge.

16 THE COURT: Okay. I'll revisit that.

17 MR. LUTZ: He wants to get into all this EEOC
18 stuff again, and I think it's utterly improper.

19 MR. MATESIC: Go ahead, I'm sorry.

20 THE COURT: You mean the 6.9 percent business?

21 MR. MATESIC: Here is where Mr. Lutz left off.
22 You were saying -- we were talking about the issue of
23 whether or not it's relevant to the case -- whether or not
24 it's relevant to the case that after July 1st, positions
25 remained open.

1 THE COURT: Right.

2 MR. MATESIC: And Brown, as we contend, was -- had
3 an application on file. Okay? Mr. Pawk said, well, that's
4 not how it works. Well, that's a factual issue, number one.
5 So it's now how it works. Mr. Lutz pointed out some
6 specific language in the memorandum. What is the memorandum
7 saying? At this time we may not be accepting employment
8 applications; however, in the future, should we be
9 commencing new projects and need additional manpower, we
10 would like you to inform us if you know of any individuals.

11 Your Honor, they are keeping these on file.
12 Their only language says that they are keeping them on file.
13 Why would you do that, unless, in your mind, you knew that
14 there would be an opening later and you wanted to get in
15 touch with this person?

16 THE COURT: I don't think that there's anything
17 wrong in asking Miss Pawk or any other representative of the
18 company whether as a matter of practice they would call
19 people whose applications they had on file to come in to --
20 to come to a job site if they needed manpower. I think you
21 are entitled to ask that.

22 MR. MATESIC: Thank you. Now, the next point --

23 MR. LUTZ: If she says no, that's it.

24 MR. MATESIC: Wait a second. I'm going to tip my
25 hand here, because this is so critical to the case. I'll

1 tell you --

2 THE COURT: Hang on just one second.

3 MR. MATESIC: This is going to take me 60 seconds.

4 I beg everyone's indulgence. She is the compliance officer.

5 I'm going to tell you exactly where I'm going with this.

6 She's the compliance officer. A compliance officer has to

7 ensure that a policy is followed. How does anyone do that?

8 Well, they have to monitor the situation. What is your

9 method for monitoring the situation? Miss Pawk has

10 testified that there's this equal employment policy at Cost,

11 and that policy covers the employee from the time they apply

12 for work throughout their entire career with Cost;

13 application, evaluation of applicants, hiring or rejection,

14 promotion, suspension, all the way to the point where they

15 either resign or are fired. Everyone agrees to that. Okay?

16 If the policy applies at all stages, let's --

17 I don't care about anything that happens over here; I'm

18 talking about this end right here (indicating).

19 Application, evaluation, and hiring. The policy applies.

20 You're the compliance officer, Miss Pawk? Yes, I am. How

21 do you evaluate compliance here? What do you do? How does

22 anyone evaluate compliance? Well, they look at outcomes.

23 Right? When you plant tulips in the fall --

24 THE COURT: This is -- I'm going to -- this is

25 completely irrelevant, and I'm going to make the point

1 again. The compliance statistics, everything we talked
2 about before, Mr. Matesic, in my view is completely
3 irrelevant to the issue of whether or not there was
4 intentional discrimination relative to this case. That is
5 my ruling. You have an objection to it. It's noted for the
6 record. Okay, let's go.

7 (Whereupon the proceedings resumed in open court
8 at 9:36 a.m.)

9 THE COURT: Good morning, please be seated.

10 (Discussion held off the record.)

11 (The record was read back by the reporter.)

12
13 G E O R G I A P A W K, having been previously
14 sworn, testified as follows:

15
16 CONTINUED DIRECT EXAMINATION

17 BY MR. MATESIC:

18
19 Q. Miss Pawk, there is more than one reason why
20 Kathleen Brown was not hired by Cost Company. Is that fair
21 to say?

22 THE COURT: Keep your voice up, you're trailing
23 off.

24 Q. I apologize. There's more than one reason why
25 Cost Company did not hire Kathleen Brown?

1 A. I believe we were not hiring operators at that
2 time, sir; that we were winding down.

3 Q. So it's fair to say the first reason is that there
4 was no job available.

5 A. It's my understanding that there was no operator's
6 position available at that time.

7 Q. Was there a laborer's position at that time?

8 A. I would not know.

9 Q. Dean Taylor would know, wouldn't he?

10 A. When I perused Ms. Brown's resume, I believe
11 there's at least 14 instances where she uses a form of the
12 word operator. It's my understanding there was one time
13 when she said laborer. It was a general laborer, not a
14 mason tender. When I looked at that, I assumed she was
15 interested in an operating engineer's position with our
16 company.

17 I called Mr. Taylor, and I said if she came back,
18 I wanted her hired as an operator. He called me and said,
19 we are done.

20 Q. I'll show you again the Minority Recruitment
21 Memorandum from yesterday.

22 A. It's not on my screen.

23 (Discussion held off the record.)

24 Q. All right, Mrs. Pawk, you were saying there was
25 one instance in which Ms. Brown requested a job as a general

1 laborer. You remember that?

2 A. I don't recall any instance where Ms. Brown
3 communicated to me she wanted to be a general laborer. We
4 do not hire general laborers.

5 Q. Communicated to Dean Taylor.

6 A. I would have no knowledge.

7 Q. This is the memorandum that you identified. You
8 have that on your screen right now?

9 A. I have part of the memorandum on my screen. Yes,
10 I do.

11 Q. Okay. At the bottom here?

12 A. Yes.

13 Q. "Position requested or interested in: Operator,
14 laborer." Do you see that?

15 A. Yes, I do.

16 Q. This is the memorandum that you received on
17 September --

18 A. 18th.

19 Q. -- 18th, 2002. So she was asking for a laborer's
20 position on September 18th, 2002, right?

21 A. Where it says "qualifications", again, it says
22 "resume attached," dot dot dot. There was no masonry tender
23 experience. We hire mason tenders.

24 Q. Not my question, Mrs. Pawk. She was asking for a
25 job as a laborer.

1 A. I cannot assume that. I'm sorry.

2 Q. You can't assume that from reading a document.

3 You don't know what the word "laborer" means?

4 A. I don't see where it says her experience as a
5 masonry -- day mason tender.

6 Q. Miss Pawk, for that job at Marienville, Cost
7 employed as many as 58 mason tenders, correct?

8 A. I do not specifically know that.

9 Q. I think we have a stipulation on the record --

10 A. Okay, fine.

11 Q. -- that there are 58 mason tenders being employed
12 by Cost as of the week ending August 5th. Do you understand
13 that?

14 A. Yes.

15 Q. Where did those mason tenders come from?

16 A. Laborer's hall.

17 Q. The laborer's union?

18 A. Yes.

19 Q. Okay. What is a laborer?

20 A. There's general laborers and there's mason tenders
21 and there's mason scaffold, there's mixers, there's scaffold
22 erectors, scaffold-building persons. Then there's persons
23 that operate a grout pump.

24 Q. The laborer's union supplied most of the people
25 that were working as mason tenders, correct?

1 A. Yes.

2 Q. Okay. That's Reason No. 1. Job availability.

3 There was a second reason, according to Cost, that Ms. Brown
4 was not hired. Is that true?

5 A. I'm sorry?

6 Q. There's another reason that you gave for why
7 Kathleen Brown did not get the job with Cost Company.

8 A. We did not have a position available for an
9 operator. When I read her resume, it says she was forklift
10 operator, certified by the International Union of Operating
11 Engineers --

12 THE COURT: Ma'am, you're going way too fast. You
13 have to slow down.

14 A. International Union of Operating Engineers. That
15 told me she was a member of 66. And you cannot have two
16 books at the same time. It's my understanding, if you're an
17 operator, you're an operator.

18 Q. Just so we're clear about this, Ms. Pawk --

19 A. I can only hire out of the Hall. If you are a
20 member --

21 THE COURT: Ma'am. Ma'am. You've really got to
22 slow down just a little bit. Don't talk over him. Wait
23 until he's done asking; and then don't talk over her. Okay?
24 Start this again. Go ahead.

25 BY MR. MATESIC:

1 Q. I'm going to take this off the table right now.
2 I'm asking you a question, Miss Pawk, as to whether, in
3 addition to these reasons, there is something else that
4 explains why Kathleen was not hired by Cost.

5 A. (No response.)

6 Q. Didn't you testify earlier in this case as to
7 another reason why Kathleen was not hired by Cost?

8 A. No. It is my understanding she was seeking an
9 operator's position, and that we did not have an operator's
10 position available at that job site. When she contacted me
11 on October 29th, I had talked to her, asked her if she --
12 she would talk to me. She said she was willing to travel
13 and she would be interested in going to Erie. It's my
14 understanding that she contacted -- she tried to contact
15 Jack Cramer, and I understand she could not be hired in
16 Erie, because we only had -- we already had a crane operator
17 there, and we did not hire any other operators at that
18 project. There was no operator position available at that
19 time on October 29th when I first established contact with
20 Ms. Brown.

21 Q. Those are the only reasons that explain why
22 Ms. Brown was not hired, according to your testimony today.

23 A. Yes. We did not have a position available for
24 her.

25 Q. Okay. I'm going to show you again the affidavit

1 that you filed in response to Ms. Brown's EEOC complaint.

2 Do you have that on your screen?

3 A. Yes, sir.

4 Q. Okay. A couple questions. First of all, you
5 understand the EEOC -- that's the Equal Employment
6 Opportunity Commission.

7 A. Correct.

8 Q. Okay. That's a federal agency whose job it is to
9 investigate claims of discrimination in the workplace.

10 A. Yes.

11 Q. And Ms. Brown lodged a complaint with that agency
12 about Cost Company.

13 A. Yes.

14 Q. And in response, you filed this document and all
15 of the attachments to this document.

16 A. Yes.

17 Q. Which we went over yesterday at some length.

18 A. Yes.

19 Q. All right. Do you see the highlighted section
20 here in the first paragraph?

21 A. Yes, I do.

22 Q. Okay. Read that into the record, please.

23 A. "At that time I perused her response and her
24 resume and noticed that neither the partially completed
25 memorandum --"

1 THE COURT: That's too fast, ma'am.

2 A. "At that time I perused her response and her
3 resume and noticed that neither the partially completed
4 memorandum, nor resume contained a telephone number. I
5 noticed the different spelling of her city, Sigel, as
6 written on the memorandum, or Sigel as typed on her resume."

7 Q. Okay.

8 A. I then tried to obtain her telephone number from
9 the telephone company, but was unable to obtain her
10 telephone number, so I wrote a memorandum to my EEO file and
11 sent Ms. Brown a note requesting a telephone number so that
12 we could hire her. I needed to be able to contact her, sir.

13 Q. When you say that her Minority Recruitment
14 Memorandum was incomplete, you're referring to the fact that
15 she didn't give you a phone number.

16 A. Yes. I need a telephone number to contact
17 someone.

18 Q. And that's another reason why -- that's another
19 reason that explains why Kathleen didn't get the job, isn't
20 it? Because she didn't give you a completed response.

21 A. No, I wrote a note to her immediately and sent it
22 off to her, to contact me. I wrote her a note. It's
23 attached to my exhibit. And I sent it. And I also made a
24 copy of the envelope where we put both spellings of her city
25 on it.

1 Q. You --

2 A. But I need to establish contact. We have to have
3 a phone number to contact somebody in the event of
4 emergency. And I wanted to speak to her, because her resume
5 was replete with her expertise as an operator operating
6 forklifts. I discerned from her resume that she was
7 probably a member of Local 66.

8 Q. All right. You needed to have an emergency phone
9 number for Ms. Brown.

10 A. Yes. Safety is first and foremost in our company.

11 Q. Ms. Brown was not your employee on September 18th,
12 2002.

13 A. It doesn't matter. I have to have a phone number
14 for emergency contact purposes.

15 Q. You have to have an emergency phone number for
16 someone who doesn't work for you?

17 A. I want to have a phone number to contact a person
18 to speak to them, yes.

19 Q. That impacts or their application for work?

20 A. It's not an application for work. Unions process
21 the applications. We hire from the union. The people that
22 are members of the union have already been processed by
23 them. If you are not in a union, but you are willing to
24 enter the union, we refer you to the union. I need a phone
25 number so that I can also communicate that on to the union

1 as well.

2 Q. That's relevant to her eligibility to work with
3 Cost?

4 A. We like everyone to furnish us an emergency
5 contact number; be it their relatives, their friends. It
6 doesn't matter.

7 Q. Even before they are hired.

8 A. (No response.)

9 Q. Even before they are hired?

10 A. It would have to be simultaneously. I have to
11 have -- in the event of an injury -- we have workers that
12 get injured the first day of their hire. I have to have
13 emergency contact. Absolutely.

14 Q. She wasn't your employee on September 18th. You
15 wanted an emergency phone number before she became --

16 A. I wanted to talk to her. I wanted to talk to her
17 about her resume, to discern if she was willing to travel.
18 I needed to know if she could run all types of rigs, cranes,
19 forklifts, as well as lulls. What cranes; 65-ton, 50-ton,
20 80-ton. I needed to talk to her.

21 Q. You had occasion to look at Ms. Brown's resume.

22 A. Yes, sir.

23 Q. At the time that you received her memorandum on
24 September 18th, 2002.

25 A. Yes, sir.

1 Q. And when you were previously deposed in the case,
2 you testified about what your impressions were after having
3 read her resume. Correct?

4 A. Yes, sir.

5 Q. And you said that after having read her resume,
6 you did not believe that she was interested in a laborer's
7 position.

8 A. I do not believe she would be qualified for a
9 laborer's position with our company or that she would be
10 interested, because she is a member of the operators'. She
11 was forklift-certified by the International Union of
12 Operating Engineers, which is Local 66.

13 Q. You did not believe that she was interested in a
14 laborer's position with Cost.

15 A. That's correct. And when she spoke, she never
16 mentioned it.

17 Q. Okay. And what is the first -- what is the first
18 position listed on her resume?

19 MR. LUTZ: Your Honor --

20 A. We went through this.

21 THE COURT: Excuse me. Hang on.

22 MR. LUTZ: I object. This has been asked and
23 answered yesterday. He has been asking and answering the
24 same question time and again --

25 THE COURT: I think this part of the field has

1 been tilled, but I'll let you ask the question one more
2 time, and move on to another area.

3 MR. MATESIC: I intend to, Your Honor.

4 Q. Go ahead.

5 A. It states, May 2002 to August 2002, laborer. And
6 if you read the description of the laborer, it has nothing
7 to do with masonry, sir.

8 Q. Okay. Let's talk about the qualifications to be a
9 mason tender. In your mind, a mason tender requires
10 particular skills.

11 A. Absolutely.

12 Q. Okay. And -- well, let me strike that question.
13 These skills can be learned on the job, can they not?

14 A. Safety is my first and foremost concern, sir. I
15 want my mason tenders to have had fall protection, to have
16 had scaffold erection, to have had scaffold dismantling, to
17 be aware of our company safety programs, have gone through
18 our orientation program, have a drug-free eligibility
19 card --

20 THE COURT: Ma'am, slow down.

21 (Discussion held off the record.)

22 A. There is several areas that they must be familiar
23 with. They must know our injury reporting requirements,
24 they must be familiar with how to properly access scaffold.
25 Rebar. Open, you know, floors, open walls, elevator shafts.

1 There is several things. They have to know how to mix
2 mortar, spread mortar, keep the job flowing, tend to the
3 bricklayers, stack the block, not overstack the scaffold,
4 make sure the scaffold is fully protected --

5 (Witness interrupted by reporter.)

6 A. We tie off and we land any materials. That all
7 scaffold work services are fully planked. That the planks
8 are properly cleated. That the planks do not have any
9 cracks.

10 There's numerous information that I would expect a
11 laborer to have, a mason tender absolutely, and I understand
12 that they do -- if they have masonry experience, have that
13 education in classes through the laborer's hall. That is my
14 understanding, sir.

15 Q. And I'm just going to ask you -- and with all due
16 respect --

17 A. Yes.

18 Q. -- because -- and I want to write down your
19 answers to this next question.

20 A. Okay.

21 Q. You just listed -- I don't know how many different
22 items that all relate to the issue of qualifications to be a
23 mason tender. Okay? Among those -- among those issues --

24 A. Yes, sir.

25 Q. -- if I correctly heard you, you said they have to

1 know our safety procedures. Right?

2 A. They have to go through the orientation program of
3 the job site as well, sir.

4 Q. They would not have gone through that job
5 orientation process before they applied. Excuse me. They
6 would not --

7 A. The hall does not send someone who is not --

8 Q. Let me --

9 A. -- experienced, sir.

10 THE COURT: Folks, I have to really ask that we
11 slow this down and don't talk over each other. Let's keep
12 going.

13 Q. Your safety orientation program --

14 A. Yes, sir.

15 Q. -- an employee doesn't go through that until after
16 they have been hired.

17 A. An employee that comes out of the hall is
18 qualified as a mason tender, has experience. The hall
19 wouldn't send someone that did not.

20 Q. I'm going to go back to that whole list of items
21 you just talked about. I want to know which of those items
22 are items -- refer to qualifications or skills that a person
23 would have by virtue of working for Cost, as opposed to any
24 other masonry contractor.

25 A. I don't think I understand your question, sir.

1 Q. Well, you talked about Cost's safety program. You
2 said that they --

3 A. That is not our safety program. You asked me what
4 I would expect a mason tender to have as experience or as
5 competency, qualification.

6 Q. Okay. Which qualifications are specific to Cost
7 Company versus any other masonry contractor? Which ones?

8 A. (No response.)

9 Q. Are there any of that whole list that are
10 specific --

11 A. I don't know what other mason contractors --

12 Q. I'm sorry?

13 A. I would not necessarily know what other mason
14 contractors require of their mason tenders. We require --

15 (Witness interrupted by reporter.)

16 THE COURT: Ma'am, I'm going to have to ask you
17 one more time -- there's no points for speed.

18 A. I would not know what Harris, Friday, Kusler,
19 Marsa, what those mason contractors necessarily require.
20 Safety is first and foremost in our company.

21 Q. You know of no other practices in the industry?
22 The practices of other contractors?

23 A. I do not want any mason tenders that do not have
24 experience on scaffold. We can't -- we do not want anyone
25 falling, we don't want any injuries.

1 Q. You have plenty of employees at Cost who have
2 worked for those other contractors that you just named. How
3 many other contractors did you just name?

4 A. You have to read back.

5 Q. Six? 10? Bricklayers switch employers all the
6 time, don't they? One season they are working for you, the
7 next season they are working for somebody else.

8 A. I still don't want someone unskilled on my job
9 site.

10 Q. I understand. Okay? You have been in this
11 business for a long time.

12 A. Since I was a little girl, yes.

13 Q. Dean Taylor has been in this business for 18
14 years. You know, Dean Taylor knows, from having spoken with
15 those people, what the practices are in the industry with
16 regard to mason-tending work.

17 A. (No response.)

18 Q. You know what other contractors do in terms of
19 masonry. You know what their policies and procedures are
20 because from time to time you employ their former employees.

21 MR. LUTZ: Objection to relevance. What
22 difference does it make with respect to Kathleen Brown what
23 other mason tenders --

24 THE COURT: Sustained.

25 Q. What qualifications does a mason tender have to

1 have to work at Cost that they don't have to have anywhere
2 else?

3 MR. LUTZ: Objection. What does it have to do --

4 A. We have to go through our procedures --

5 THE COURT: Hang on a second.

6 Q. Your procedures.

7 MR. MATESIC: That's fine, Your Honor.

8 MR. LUTZ: Objection. Relevance.

9 THE COURT: Overruled.

10 MR. MATESIC: It's fine.

11 (Discussion held off the record.)

12 Q. Okay. I'm putting before you your deposition
13 transcript from May of 2004. We talked about this issue
14 about the qualifications of a mason tender, the skills
15 required of a mason tender, the sorts of tasks that a mason
16 tender performs. Do you remember that line of questions?

17 A. Yes, sir.

18 Q. Okay. And do you remember me asking you whether
19 these were skills that could be learned on the job?

20 A. If Dean Taylor is comfortable with someone and
21 their experience, then absolutely. He is the foreman. He
22 would know best.

23 Q. You already testified on this issue, Miss Pawk.
24 You have already given an answer on this issue. What was
25 your answer?

1 MR. LUTZ: Objection, Your Honor. Could he point
2 to a specific --

3 A. I --

4 THE COURT: Excuse me. Excuse me.

5 MR. MATESIC: I'm going to take this off the
6 screen, Your Honor.

7 BY MR. MATESIC:

8 Q. What was your answer?

9 MR. LUTZ: Objection. He's now removed it from
10 the screen. And my objection was could he just show her the
11 deposition transcript and point to a specific question.

12 MR. MATESIC: I don't have to do that, Your Honor.

13 THE COURT: Well, I'll be the judge of what people
14 do or do not have to do. In this particular case, I think
15 in fairness, you should show her the deposition, either on
16 the screen or up there. I don't know even what question we
17 are talking about, because it just came off my screen. So
18 let's show her.

19 MR. MATESIC: Well, I think, just for the
20 record --

21 THE COURT: What is the question?

22 MR. MATESIC: Well, the question is, you've --
23 well, you've already testified -- well, can you read back
24 the question, just so we're clear.

25 (Record read back by the reporter.)

1 BY MR. MATESIC:

2 Q. What was your answer during your deposition in May
3 of 2004 as to whether or not these skills could be learned
4 on the job?

5 MR. LUTZ: Objection, Your Honor. Is he going to
6 show her the transcript?

7 A. I don't specifically recall my answer on --

8 THE COURT: All right.

9 A. -- May 27th, 2004. I believe --

10 Q. Go ahead.

11 A. Again, I think some of the skills, possibly, you
12 can learn on the job, but I am not a foreman. When a labor
13 union sends out a mason tender, I presume that person is
14 experienced.

15 Q. Do you know of any laborer who hasn't learned
16 those skills on the job?

17 A. I don't understand your question. Do I know of a
18 laborer that went to school? Or what are you asking me?

19 Q. My earlier question was, aren't these skills that
20 are learned on the job. You're kind of unsure. Is that
21 fair --

22 A. I'm sure some of these skills can be learned on
23 the job, absolutely.

24 Q. Can you name for me a single laborer who did not
25 learn his skills on the job?

1 A. Laborers may have learned their skills on previous
2 jobs.

3 Q. Different question, ma'am. Identify for me a
4 laborer -- from the hundreds of laborers that you have
5 employed, identify one for me who did not learn the skills
6 on the job. Meaning they didn't have those skills on the
7 first day that they began working. They learned those
8 skills after their first day of employment. Name one for
9 me.

10 A. There is a laborer apprenticeship program, sir.

11 Q. Name somebody.

12 A. That went to an apprenticeship program?

13 Q. Name -- fine. Name somebody.

14 A. Ricky Alley, Jimmy Alley, Jimmy Born. They have
15 had previous experience with our company. I don't
16 understand your question. I'm sorry.

17 Q. The answer that you gave, that's not the same
18 answer that you gave in May of 2000 --

19 A. I believe I said you need to have certain skills.
20 I believe I touched on qualifications --

21 (Witness interrupted by the reporter.)

22 A. I believe I stated that you had to have certain
23 skills, such as understand the fall protection requirements
24 for OSHA, understand scaffold erection. How we land
25 materials, we have a hundred percent tie-off. And maybe

1 some companies aren't. OSHA is the minimum. Maybe we
2 require more.

3 THE COURT: Can I see counsel at side-bar for a
4 second.

5 (Whereupon the following discussion occurred on
6 the record at side-bar:)

7 THE COURT: This isn't going -- this is -- I don't
8 want to waste the jury's time with going round and round.
9 It's not my position to butt into people's cases, but I do
10 have an obligation to keep this going.

11 At the break, tell her to slow down. It's an
12 impossibility.

13 MR. MATESIC: Judge, may I just have a second. I
14 was going to show her her answer --

15 THE COURT: That's okay.

16 MR. MATESIC: That's what it is all leading to.

17 THE COURT: You're cross-examining her now.

18 (End of discussion at side-bar.)

19 BY MR. MATESIC:

20 Q. Let's start at Page 146, Line 13. Do you see
21 where I am?

22 A. Yes, sir.

23 Q. I'm going to read the question, you read the
24 answer. Okay?

25 A. Yes, sir.

1 Q. "Were there specific skills that someone would
2 have to have to work as a laborer at the Marienville site in
3 July of 2002?"

4 A. "Yes."

5 Q. I apologize. Your answer?

6 A. "Yes."

7 Q. "Question: What were those skills, please?" Your
8 answer?

9 A. "I think you need to be experienced in working
10 construction with masonry, with bricklayers, know how to mix
11 mortar, know how to spread the mortar, know how to stock the
12 scaffold, know how to not overstock the scaffold, know how
13 to access scaffold --"

14 (Witness interrupted by the reporter.)

15 A. "Know how to spread the mortar, know how to stock
16 the scaffold, know how to not overstock the scaffold, know
17 how to access scaffold, know how to erect scaffold, know how
18 to dismantle scaffold, know how to properly cap rebar,
19 possibly know how to operate hilti guns, or how to operate
20 the mixing equipment," period.

21 Q. Now, on Page 147.

22 A. Yes, sir.

23 Q. All right. Line 12. "Question: Do you know of
24 any laborer who has not learned these skills on the job?"
25 Your answer?

1 A. "No."

2 Q. That's not the answer you gave today.

3 A. Well, I think you learn your skills through
4 experience. And I think also our scaffold erectors, they
5 also have special training. We have sub --

6 (Witness interrupted by reporter.)

7 A. We have Subpart M and Subpart L classes where we
8 invite the OSHA area directors and the compliance officers,
9 such as Bill Mason, Brian Goodrich, Tom Telly, Van
10 Stelsignor (phonetic), and they come, and they give training
11 seminars and -- scaffold erection and dismantling is very
12 dangerous, because it's almost impossible and not feasible
13 to be tied off. Extremely dangerous.

14 So, yes, there is training and special classes for
15 the certain laborers, absolutely. The scaffold erection and
16 dismantling. Absolutely, sir.

17 MR. MATESIC: Your Honor, I move to strike the
18 answer.

19 THE COURT: Denied.

20 MR. MATESIC: It's not responsive to the question.

21 THE COURT: It's denied.

22 Q. Miss Pawk, who were the people that you said were
23 the laborers that did not learn the skills on the job? Tell
24 me again.

25 A. A few minutes ago?

1 Q. Yes.

2 A. Jimmy Alley, Ricky Alley, James Born, Ronnie
3 Wright. They have done both special training, as well as on
4 the job through their years and years of masonry tending
5 experience, sir.

6 Q. Anyone else?

7 A. Yes. I can't name them all.

8 Q. How many? Just estimate.

9 A. How many --

10 THE COURT: Move on to another area.

11 MR. MATESIC: Your Honor --

12 THE COURT: After this. Move on to another area.

13 MR. MATESIC: I understand.

14 BY MR. MATESIC:

15 Q. When did you learn that those people that you just
16 identified had learned their skills somewhere besides the
17 job? Had learned their skills through some means other than
18 on the job.

19 A. We hold some of the training seminars in
20 conjunction with the union. I don't understand your
21 question. I'm sorry.

22 Q. A date. A year. A year. When did you learn that
23 those three or four guys you just talked about learned their
24 skills --

25 A. All of our -- our laborers and our foremen come to

1 safety meetings periodically throughout the year where we
2 address a topic. I don't understand what you're saying.

3 Q. Did you know in 2004 that those people you just
4 named had learned their skills by virtue of some process
5 other than on the job? They had learned them not on the
6 job, but through some other training? Did you know that in
7 2004? Last year.

8 A. Yes. They have attended seminars throughout -- I
9 don't understand your question. I'm sorry.

10 Q. I understand your answer.

11 A. All right.

12 Q. Was the fact that Ms. Brown did not submit an
13 application, did that impact on her eligibility to work for
14 Cost?

15 A. We do not have applications. The union halls
16 process persons.

17 Q. You don't use applications at all.

18 A. No, we do not. We have to hire out of the hall.
19 Or if they are not in the union, and we ask if they are
20 willing to join, we refer them to the hall.

21 Q. What records, if any, do you have of the people
22 who apply for work with Cost?

23 A. We do not have applications. If someone is hired
24 or going to be hired, they go to their labor steward and are
25 referred to the hall, and the hall processes them. We just

1 have employees fill out I-9's, W-4's, and emergency
2 information, contact.

3 Q. How many applications do you get in a year? Could
4 you estimate for me. You're the president of the company.
5 How many applications do you get from people who are seeking
6 to do these jobs; operators, laborers, bricklayers? Just
7 round it to the nearest hundred, if you can.

8 A. I do not receive any applications --

9 Q. I -- forgive me. I misstated that. How many
10 requests for employment do you get on average in a given
11 year?

12 MR. LUTZ: Objection to relevance, Your Honor.

13 THE COURT: Sustained.

14 Q. You don't have any record of applications. We
15 already established that. Or we -- strike that question.
16 We have already established that you don't have any record
17 of the people, the identity of the people who seek work from
18 Cost. Correct?

19 A. (No response.)

20 Q. That specific issue. The identity of someone who
21 has come to Cost or by any other means has been referred to
22 Cost seeking a job. You don't have any record of that.

23 MR. LUTZ: Objection. Relevance.

24 THE COURT: Overruled. Do you understand the
25 question?

1 A. If someone calls me and is interested in a
2 position, I type up a memorandum. I do not have
3 applications. We hire out of the hall. The hall sends the
4 work -- the manpower.

5 Q. But Dean Taylor testified that if a bricklayer
6 came to the trailer and left his name and his phone number
7 on a little slip of paper, that would constitute a request
8 for employment. Do you have any reason to disagree with
9 Dean Taylor?

10 A. No, I have no reason to disagree with Dean Taylor.

11 Q. Okay. And you don't -- that would not end up in a
12 memorandum that you keep, correct?

13 A. I wouldn't have knowledge of that.

14 Q. Okay. So what I want to know, Ms. Pawk, is in how
15 many instances in a given year, on average, do people come
16 to Cost and seek employment? That's what I want to know.
17 Is it -- let me show you this --

18 A. I would not know that. If they come to Dean
19 Taylor, I would not know that, sir.

20 Q. Okay. Here is Dean Taylor's affidavit. Paragraph
21 8. Do you have that on your screen?

22 A. Yes, sir.

23 Q. Okay. "During the course of the project, over a
24 hundred people presented themselves to me at the site
25 seeking work, who were turned away because we were not

1 hiring at that time."

2 Did I read that correctly?

3 A. Yes, sir.

4 Q. You have no record of those hundred people; who
5 they were.

6 A. I do not.

7 Q. Thank you. You are the Equal Employment
8 Compliance Officer for Cost.

9 A. Yes, I am.

10 Q. Okay.

11 THE COURT: Sir, I've got to ask you to sit down.

12 MR. LUTZ: He's writing. I can't see from there,
13 Your Honor.

14 THE COURT: All right.

15 MR. LUTZ: I need to know what he is writing.

16 A. I'm the Equal Employment Opportunity Officer.

17 Q. The Equal Employment Opportunity -- didn't you use
18 the word "compliance officer"?

19 A. No, sir. EEO Officer, sir.

20 Q. Equal Employment Opportunity Officer.

21 A. Yes, sir.

22 Q. Well, part of your job is to measure compliance
23 with the Equal Employment folks, right?

24 A. My job is to strive to meet the goals, which are
25 objectives, not quotas. My job is to further the goals and

1 create an opportunity for someone to get equal employment.

2 If I get a female, a minority, an Indian, an
3 Asian, any person who is qualified, and I can increase the
4 pool and refer them to the union hall to increase the pool,
5 then I have succeeded in promoting and furthering those
6 goals, which are objectives. And that they are now
7 available and have the opportunity to become employed where
8 they will receive equal treatment as those similarly
9 situated, they will not be discriminated against for race,
10 sex, gender, creed, national origin, ethnic background,
11 religion, veterans disability status, handicapped, mental or
12 physical handicapped, age, sexual preference, or sexual
13 orientation.

14 Q. Okay.

15 A. I try to give them the opportunity -- it's my
16 understanding that if I can increase the pool, and they are
17 now available and have an opportunity to be called out, if
18 they are not called out to Cost, and they end up getting
19 called out to Marsa or Kusler or Harris or P.J. Dick or
20 Trumbell, that they now have that opportunity for equal
21 employment, sir.

22 Q. Okay. Now, you see the document I have placed
23 before you?

24 A. Yes, I do, sir.

25 Q. Okay. It's entitled the Affirmative Action Plan?

1 A. Yes.

2 Q. It's under Cost's letterhead?

3 A. Yes, it is, sir.

4 Q. You are the author of this document; is that fair
5 to say?

6 A. I am the author of the document.

7 Q. Okay. And Paragraph 1, "All provisions of Title
8 VI [sic] of the Federal Civil Rights Act of 1964,
9 President's Executive Order 11246 --"

10 A. Yes.

11 Q. "-- Section 3 of the Housing and Urban Development
12 Act of 1968 shall be followed to provide equal opportunity
13 with the company for all people, regardless of race, creed,
14 color, sex, religion, national origin, age," et cetera.
15 Those are your words.

16 A. Yes, those are my words. But I want to say one
17 thing that I think will speed us along. I do not know if
18 Dean hired off the street. We do not hire off the street.
19 If they do, it's an exigent circumstance, so there would not
20 be a log kept of anyone coming off the street, so I would
21 not know about it, sir.

22 Q. Okay. It applies in the context of hiring,
23 doesn't it? The Affirmative Action Plan.

24 A. You are to promote and further goals --

25 MR. LUTZ: Objection, Your Honor.

1 THE COURT: Hang on a second.

2 A. -- which are objectives, sir --

3 THE COURT: Ma'am, hang on a second, please.

4 MR. LUTZ: Objection, Your Honor. We are getting
5 into what we agreed we are not going to get into.

6 MR. MATESIC: I don't believe that's true, Your
7 Honor. We have to have a side-bar on this.

8 THE COURT: All right, side-bar.

9 (Whereupon the following discussion took place on
10 the record at sidebar:)

11 THE COURT: Go ahead.

12 MR. MATESIC: Our burden is to show that --

13 THE COURT: She has no burden.

14 MR. MATESIC: Her, Kathleen Brown's burden, is to
15 show in terms of the punitive damages claim either malice or
16 reckless indifference to quote/unquote -- quote/unquote,
17 federally protected rights. The federally protected rights
18 are the rights under Title VII. Okay? And I have to get
19 this witness to say that she knows what the rights are under
20 Title VII. She has to identify that there is a federally --

21 THE COURT: You can ask her that. That's
22 legitimate.

23 MR. MATESIC: That is where this is going.

24 THE COURT: But I don't want this to meander into
25 quotas or affirmative action.

1 MR. MATESIC: It's not going to.

2 (End of discussion at side-bar.)

3 BY MR. MATESIC:

4 Q. Okay. This is back up on the screen. All
5 provisions of Title VI the Federal Civil Rights Act of 1964.
6 Is that a typo, Miss --

7 A. Yes, that's a typo. It should be Title VII.
8 There are numerous typos in this document. I authored it,
9 someone else typed it.

10 Q. Title VII of the Civil Rights Act, 1964?

11 A. Correct, Title VII.

12 Q. And that is a law that was passed by Congress to
13 prohibit discrimination in employment, correct?

14 A. To prohibit discrimination in employment, in
15 hiring, promoting, training, firing, et cetera.

16 Q. Title VII of the Civil Rights Act guarantees to
17 persons who are applying for employment that they will not
18 be discriminated against on the basis of, among other
19 things, their gender.

20 A. Correct.

21 Q. All right. And President's Executive Order 11246,
22 what is that?

23 A. I believe those are the implementing --
24 implementing regulations, sir.

25 Q. The regulations that were promulgated by a federal

1 agency to make sure that Title VII's protections are carried
2 out in the United States.

3 A. Yes. And I believe we comply with this on all
4 jobs; federal, state; whether they are small, whether
5 they're large, whether they're for the Catholic Diocese,
6 whether they're for Brith Shalom; any project, any size.

7 Q. And you have read those regulations; is that true?

8 A. Yes.

9 MR. MATESIC: Your Honor, we need another
10 side-bar. I apologize.

11 (Whereupon the following discussion was held on
12 the record at side-bar:)

13 MR. MATESIC: My intent is to show -- these are
14 the regulations that the witness just referred to. Okay?
15 My intention is to put this before her and ask her if she
16 has read this document. I am not going to get to the quotas
17 section, wherever that is.

18 THE COURT: What does the regulation deal with?

19 MR. MATESIC: The regulation, it states the
20 purposes of affirmative action programs. To show that the
21 applicant pool -- I'll read it right into the record.

22 A central premise underlying affirmative
23 action is that absence of discrimination. Over time, a
24 contractor's workforce generally will reflect the gender,
25 racial, and ethnic profile of the labor pools from which the

1 contractor recruits and selects. Affirmative action
2 programs containing a diagnostic component which includes a
3 number of quantitative analyses and so forth. And I don't
4 intend to go very far in here. But she has already
5 identified the regulations, she has read the regulations.
6 Did you read this regulation? That's a fair question.

7 THE COURT: All right. That's an affirmative
8 action regulation. It is so specified by title. And let's
9 assume she identifies it and says I had some passing or
10 general familiarity with it.

11 MR. MATESIC: All I want her to say is that she
12 read these sections.

13 THE COURT: What is it probative of? She said
14 they don't keep application records. They have no way of
15 knowing what the labor pool is.

16 MR. MATESIC: I am not going to bring up
17 6.9 percent, 50 percent. I am just saying they have no way
18 of knowing what the pool is.

19 This application, she said she read it. This
20 application is --

21 THE COURT: Sustained.

22 (End of discussion at side-bar.)

23 MR. MATESIC: Just one moment, Your Honor.

24 THE COURT: Okay.

25 (Brief pause.)

1 BY MR. MATESIC:

2 Q. Ms. Pawk, I'm placing before you what has been
3 labeled Plaintiff's Exhibit 13. Do you see that on your
4 screen?

5 A. Yes, sir.

6 Q. A memorandum dated September 18th, 2002.

7 A. Yes, sir.

8 Q. This memorandum was written by you. The GCP
9 initials refer to?

10 A. Georgia Cost Pawk.

11 Q. All right. And in the address line, you indicate
12 that this memo ended up in four different places; EEO file,
13 Raymond Sekowski, Dean Taylor, and Jaime Greco. Correct?

14 A. Yes, sir.

15 Q. Did you ever confirm with Dean Taylor that he
16 received this memo?

17 MR. LUTZ: Your Honor, this memo was brought up
18 yesterday. All these questions were asked and answered
19 yesterday. Why do we have to rehash this? I object. It's
20 asked and answered.

21 THE COURT: Overruled. Go ahead.

22 A. I believe I may have even telephoned Dean Taylor,
23 and I stated to him that if a female came to the job site, I
24 wanted her phone number so that I could contact her, and I
25 wanted her to be hired.

1 Q. And yesterday we were talking about the answers
2 that Mr. Taylor had provided in this case previously. And I
3 believe you said that you had no idea what answers
4 Mr. Taylor had given in this case. Is that a fair
5 characterization of your testimony?

6 A. I have not reviewed Mr. Taylor's deposition or sat
7 in here while he testified.

8 Q. Okay. This case has been chugging along for about
9 two years now, right?

10 A. (No response.)

11 Q. Correct?

12 A. Yes.

13 Q. Okay. And several employees of Cost were deposed
14 in this case. Correct?

15 A. Dean Taylor, Billy Heaton, myself.

16 Q. Right.

17 A. Yes.

18 Q. And you are an attorney.

19 A. Yes.

20 Q. You worked for two years in securities fraud
21 cases, correct?

22 A. Yes, I did.

23 Q. You conducted depositions yourself?

24 A. No, I did not.

25 Q. You did not. You know what a deposition is?

1 A. Yes, sir.

2 Q. You know that depositions are used to gather
3 evidence that can be used at trial.

4 A. Yes, sir.

5 Q. You knew that Kathleen Brown was claiming that
6 your company had discriminated against her.

7 A. I did not know that at the time this memorandum
8 was drafted, no, sir.

9 Q. Well, let's take that memorandum off the screen
10 for a second. I'm talking about anytime before today.
11 Anytime before yesterday. You knew that Kathleen Brown had
12 sued your company, correct?

13 A. Yes, sir.

14 Q. And you're the president of Cost Company, correct?

15 A. Yes, sir.

16 Q. And you know that your employees have given sworn
17 statements in this case which will impact on the result of
18 this trial, correct?

19 A. Correct, sir.

20 Q. Okay. There's a lot of evidence in there. And
21 you, as the president, have a concern as to whether or not
22 this case comes out in your favor or against you, correct?

23 A. Yes, sir.

24 Q. All right. And it just so happens that as the
25 president of the company, you have access to these

1 transcripts. You are the client here, correct?

2 A. Correct.

3 Q. And you never once looked at them. Is that your
4 testimony?

5 A. I reviewed some transcripts. You asked me about
6 Dean Taylor's.

7 Q. Which ones did you -- which ones did you review,
8 Miss Pawk?

9 A. Ms. Brown's, Mr. Heaton's.

10 Q. Mr. Heaton. So you did look --

11 A. But I did not review Mr. Taylor's in its entirety,
12 no, sir.

13 Q. As the president of the company, you would have a
14 concern if a verdict came out against you, correct?

15 MR. LUTZ: Objection, Your Honor.

16 THE COURT: Overruled.

17 A. Yes, sir.

18 Q. Okay. And as the president of the company, you
19 would want to do whatever you could do to assist these two
20 lawyers here in helping you win this case, correct?

21 A. Yes.

22 Q. And that would include getting together with them
23 and discussing the evidence in the case. Correct?

24 A. Correct.

25 Q. That would include getting together with them and

1 discussing strategy; what evidence do we need to get out
2 there so that we can win this case. Correct?

3 A. Yes.

4 Q. Okay. And you had these deposition transcripts
5 available to you. And you never looked at the transcript of
6 Dean Taylor?

7 A. I looked at some of it, I did not read it in its
8 entirety, sir; no, I did not. I spoke to Dean about this,
9 and I assumed that what he told me was accurate, sir.

10 Q. So the fact that you didn't look at Dean Taylor's
11 transcript, that impaired your ability to help these
12 gentlemen defend you in this case. Would you agree with
13 that?

14 MR. LUTZ: Objection.

15 THE COURT: Sustained. We're going to take a
16 short break.

17 (Whereupon the following discussion occurred on
18 the record in camera:)

19 THE COURT: Before we continue, I want to take a
20 minute, and I want you to go to Page 8 and read Page 8 and
21 Page 9. And I made the changes consistent with our
22 discussion. And there is a -- in my view, a hopeless
23 contradiction here. But go ahead and read it, and I'll tell
24 you what I think it is; why we still have to tinker with it.

25 MR. PAWK: I see what you're thinking. Because of

1 the operator.

2 THE COURT: Absolutely. The point is, again --

3 MR. MATESIC: I'm sorry, Your Honor. I apologize.

4 THE COURT: You finish reading it first. Then
5 we'll talk about it.

6 MR. MATESIC: Okay.

7 THE COURT: My point is, the reason this doesn't
8 make sense is if they find a prima facie case has been made
9 out, they have -- in doing so, they have factually
10 discredited your legitimate nondiscriminatory reason. And
11 so I'm wondering if they find a prima facie case, then they
12 will already have implicitly rejected your legitimate
13 nondiscriminatory reason. Then the only question becomes
14 whether that reason -- well, to go to the -- do you see what
15 I'm saying?

16 MR. MATESIC: Yeah. And I can respond to it.
17 Okay. Let's assume that everything that you said is true.
18 Let's assume that on the day that -- on the day that
19 Kathleen is hired, she says thank you very much, and then
20 she just bursts out an expletive, okay, and she doesn't get
21 the job. At the time that they are about to hire her, she
22 says something totally irrelevant to qualifications, just
23 something --

24 THE COURT: You're meandering off the point, with
25 all respect. Assume that they find that she applied -- as

1 part of the prima facie case, she applied for the labor
2 position. Let's assume they find that. And let's assume
3 they also find that there was a laborer's position and all
4 the other elements of the prima facie case are made out.

5 My point is, that's precisely your defense;
6 that there wasn't a laborer's position. But more
7 importantly, she didn't apply for one. Where does that
8 leave you if the jury comes back and finds that there's a
9 prima facie case?

10 MR. MATESIC: Who to believe.

11 THE COURT: You're not following my point,
12 Mr. Matesic, but they are. My point is that burden
13 shifting, given the fact that your -- your defense is part
14 of the prima facie case, they have answered your
15 burden-shifting factual contention by answering the prima
16 facie case. That's why it was my suggestion -- and I think
17 it was a better one -- that the thing be set up the way that
18 it was. Do you follow my point?

19 MR. MATESIC: I'm having great difficulty
20 following the point. Because as I -- obviously, as we
21 talked about with the Green case today, all right, it always
22 come back to this issue of pretext. They do have reasons
23 for why they didn't hire her. Okay? Why she did not get a
24 job. All right? And those reasons are independent of the
25 facts --

1 THE COURT: On the prima facie -- they are not.
2 Emphatically, the reason they didn't hire her and the only
3 reason that they are proffering to the jury is she came in
4 and asked for an operator's position, and we didn't have an
5 operator's position.

6 Now, as an aside, they are putting you to
7 your burden to prove that there were laborer positions
8 available. That's their sole reason. In answering the
9 prima facie case by saying we find she applied for laborer's
10 position, they have rebutted -- they have rejected the
11 Defendant's legitimate nondiscriminatory reason for not
12 hiring her.

13 See, this is good for you. I don't know if
14 you realize that.

15 MR. MATESIC: No, I do realize this.

16 THE COURT: This falls out in the category of a
17 gift horse in someone's mouth.

18 MR. MATESIC: As I said this morning, I see it
19 from both sides. Because on the one hand, it's good for me,
20 but I'm fearful of the possibility that there's some way,
21 there's some instance, some scenario in which -- you know,
22 based on this language, we are still going to lose this
23 case. And I don't want to give them that --

24 THE COURT: Well, there is always that.

25 MR. MATESIC: I don't want to give the Defendant

1 that they --

2 THE COURT: Nor should you. Nor they, on the
3 other side. I'm not suggesting you give them anything. I
4 don't want this record to come back -- I don't want a
5 reversal more than anybody else. I like to try them and be
6 done with them. What do you suggest to do about this?

7 MR. PAWK: Judge, in your original draft, you put
8 in No. 2 under the prima facie case, you put -- I asked
9 Becky to get it, because I didn't bring it in.

10 (Discussion held off the record.)

11 THE COURT: I think the other way to do it would
12 be this: Here is another possibility. If they find a prima
13 facie case, then they have implicitly rejected your
14 nondiscriminatory reason. Explicitly, if you will, without
15 knowing it.

16 Then the only question is that doesn't mean
17 automatically that the mere fact that your reason was false,
18 then they may -- that's when I would say if you find the
19 prima facie case, you may, but you -- you may find that the
20 decision was -- then use that language out of my charge,
21 where you may find with -- and just skip the discussion
22 about burden shifting. Because it doesn't make any sense.

23 MR. LUTZ: I think that would clean it up some,
24 Your Honor.

25 THE COURT: For instance, if they find there's a

1 prima facie case, what I would propose to do, then, is this:
2 Bear with me.

3 Do you have a thought on this?

4 MR. MATESIC: Besides my general sense of
5 confusion? No. I mean --

6 MR. PAWK: Judge, your thought was the second;
7 instead of putting burden shifting in it, they would have to
8 also find --

9 THE COURT: Okay. So now they find a prima facie
10 case. I say, if you find all that, then you must
11 determine -- then you must determine whether Brown's [sic]
12 decision not to hire was, in fact, motivated by gender.

13 MR. LUTZ: Cost's decision not to hire.

14 THE COURT: Then I would say Brown must show that
15 the stated reason -- well, Brown must show not only that the
16 stated reason was false, but that the real reason for the
17 challenged employment decision was because of her sex. Then
18 go on and give the rest of the charge on pretext. I mean,
19 on how you demonstrate that. Do you see what I'm saying?

20 MR. MATESIC: Yeah, I do understand what you're
21 saying.

22 THE COURT: In other words, once the prima facie
23 case has been established, I then say at the top of Page 10,
24 if you find that a prima facie case has been established --
25 has been established, Brown must show that the stated --

1 Brown must show that the stated reason --

2 MR. PAWK: Judge, I'm sorry. You're on 10.

3 THE COURT: My Page 10. I'm halfway up here at
4 the top of the page where it says, "Rather, Brown".

5 Now, they already will have found by virtue
6 of the prima facie case that the stated reason is false.
7 But so I'm not -- I'm going to say, rather, if you find that
8 Plaintiff has made out a prima facie case, you must
9 determine whether the real reason for the challenged
10 employment decision was because of her sex. In other words,
11 then I'll --

12 MR. MATESIC: I think that's where the two prongs
13 from Fuentes come in. There is two ways to do this. You
14 can show that the employer has given reasons that are
15 implausible, incoherent, inconsistent, number one, or,
16 number two, that discrimination was --

17 THE COURT: All right. Then I propose I go ahead
18 and give the second part of that charge, just like it's
19 there. But the problem is that charge presumes that the
20 jury is still struggling with your burden-shifting issue.
21 Basically, short of determining whether gender was a
22 motivating factor, if the jury finds there is a prima facie
23 case here, that's all there is for them to determine.

24 MR. LUTZ: They have to find discrimination on top
25 of that.

1 THE COURT: That's what I mean. They have to
2 determine whether or not having concluded -- see, that's why
3 I think the way I had it set up made a heck of a lot more
4 sense.

5 MR. LUTZ: That's the correct statement of the
6 law, because that is what his burden is. Whether it shifts
7 or not, he still has to show those things.

8 THE COURT: There would be no additional burden
9 placed on him.

10 MR. LUTZ: Correct.

11 THE COURT: Or on the Plaintiff.

12 MR. LUTZ: And it would just confuse the jury if
13 we talk about shifting the burden, when there is really not
14 a shift, per se.

15 MR. MATESIC: Well, hang on a second.

16 (Discussion held off the record.)

17 MR. LUTZ: We don't have a problem with that.

18 THE COURT: I don't think you will either, when we
19 see it. We'll rework it, and I'd be happy to hear from you
20 after you see the draft.

21 MR. MATESIC: Becky, can you reiterate what you
22 struck.

23 THE CLERK: The prima facie case will stay the
24 same on Page 8 --

25 THE COURT: Here; let me do it, Becky. Everything

1 is the same on 8. And then on 9, where it says -- well
2 this --

3 (Discussion held off the record.)

4 MR. LUTZ: So you strike beginning with, "The law
5 then requires".

6 THE COURT: It would be, "The law then requires
7 her to demonstrate that the failure to hire her was the
8 result of intentional discrimination." And then all the
9 rest of Page 9 comes out. All the rest of 10 comes out.
10 All of 10 comes out. And then on Page 11, the little top
11 paragraph and the second paragraph come out. And we would
12 start, "In order to satisfy her burden of proving
13 intentional discrimination".

14 How much longer do we have with Miss Pawk, do
15 you figure?

16 MR. LUTZ: Could we have -- he's way beyond -- I
17 realize it was a brief offer yesterday, but he has gone way
18 beyond in many ways.

19 THE COURT: I don't want to do an offer. Because
20 that will take up time. Let's just go out and do it.

21 MR. MATESIC: All right, sir.

22 (Whereupon the proceedings resumed in open court
23 at 11:13 a.m.)

24 BY MR. MATESIC:

25 Q. Mrs. Pawk, do you know who Ronald Barrett is?

1 A. I know of two Ronald Barretts.

2 Q. Well, first of all, are those two Ronald Barretts
3 related to one another?

4 A. I do not know.

5 Q. Okay. Do you know of the Ronald Barrett who is
6 the business agent or the recently retired business agent --

7 A. Yes.

8 Q. -- for Laborers -- let me finish the question.
9 For Laborers Local 952?

10 THE COURT: Do you know him?

11 Q. Do you know him?

12 A. Yes.

13 Q. And he also gave a deposition in this case.

14 A. Yes.

15 Q. Did you ever have occasion to read his deposition?

16 A. I do not remember.

17 Q. I'm placing before you what has been previously
18 labeled as Plaintiff's Exhibit 8. Do you have that in front
19 of you?

20 A. Yes, sir.

21 Q. Do you recognize the three names on that exhibit?

22 A. (No response.)

23 Q. Those are Cost employees. They were Cost
24 employees. Excuse me. In the year 2002.

25 A. Okay.

1 Q. You agree?

2 A. I do not personally recognize those names, sir.

3 Q. Okay. Mr. Barrett testified that Mr. Bell joined
4 the union on August 1st, 2002. Are you aware of that?

5 A. Am I aware that Mr. Barrett so testified?

6 Q. Yes.

7 A. No, sir.

8 Q. Okay. Do you have any reason to doubt that; that
9 Mr. --

10 A. No, sir.

11 Q. And Mr. Barrett testified that that start date was
12 close in time to the date on which Cost hired that employee.

13 MR. LUTZ: Objection, Your Honor.

14 Q. Do you know that he testified to that?

15 MR. LUTZ: I'm sorry. I thought he was finished.

16 THE COURT: If she doesn't know what he testified
17 to, then she doesn't -- maybe that's the first question.

18 MR. MATESIC: It is the first question.

19 MR. LUTZ: Well, she already said she doesn't know
20 what he testified to. Now he's trying to sum up --

21 THE COURT: You can't testify for the man who
22 already testified.

23 MR. LUTZ: Right.

24 THE COURT: It's sustained.

25 BY MR. MATESIC:

1 Q. Do you have records of when John Bell was hired by
2 Cost?

3 A. I would believe payroll would have records.

4 Q. Well, let's look at the payroll records.

5 MR. MATESIC: This is Plaintiff's 14.

6 Q. Miss Pawk, I'm placing before you Plaintiff's
7 Exhibit 14. Do you see that?

8 A. Yes, sir.

9 Q. This is one of those weekly payroll certification
10 documents that you were testifying about yesterday.

11 A. Yes.

12 Q. This is a document that Cost turns in to the State
13 on a weekly basis?

14 A. Yes. I believe they are generated weekly and
15 possibly sent in with the monthly billings, sir.

16 Q. All right. And this document represents to the
17 State that Cost has paid all of the employees listed in this
18 document the prevailing wage. Correct?

19 A. Yes.

20 Q. And you have to include all of your employees in
21 that document. Correct?

22 A. Yes.

23 Q. Okay. You list the employees of Cost in this
24 document in alphabetical order, correct?

25 A. I do not specifically recall.

1 Q. Well, let's -- we'll turn to a few pages. Okay?
2 I'm turning to the third page now. What name do you see at
3 the top?

4 A. Phillip J. Allen.

5 Q. What name do you see below him?

6 A. Jamie L. Altemus.

7 Q. How about on the next page? What name do you see?

8 A. Gary Baker.

9 Q. Okay. John Beatty?

10 MR. MATESIC: Would you stipulate that these names
11 are all in alphabetical order?

12 MR. LUTZ: Yes.

13 MR. PAWK: Yes.

14 MR. MATESIC: All right. We have a stipulation.

15 BY MR. MATESIC:

16 Q. What is the page number that I am pointing to?

17 A. Page 2.

18 Q. The last entry on 2 is?

19 A. John Beatty.

20 Q. Okay. What page am I pointing to right now?

21 A. 3.

22 Q. What is the first entry of Page 3?

23 A. Edward Bendevnas (phonetic).

24 Q. So this record indicates that John Bell was not an
25 employee of Cost during the week ending August 5th, 2002,

1 correct?

2 A. Yes, correct.

3 Q. You have a duty under the law to provide accurate
4 information to the Commonwealth of Pennsylvania, correct?

5 A. Yes.

6 Q. And this document represents accurate information;
7 the accurate information that you provided to the
8 Commonwealth of Pennsylvania for all the work that was
9 performed by Cost employees during the week ending
10 August 5th, 2002.

11 A. Yes. But I would need to see the subsequent week.

12 Q. Well, we'll take a look at that in a moment.
13 Let's go back to Phillip Allen. Do you see that on your
14 screen?

15 A. Yes.

16 Q. Now, the information relevant to Mr. Allen's work
17 for Cost that I'm pointing to right now is the number of
18 regular hours that that employee worked, this first line of
19 information, this tells the reader of this document how many
20 hours the employee worked, regular hours, on July 30. Do
21 you see that?

22 A. Yes, sir.

23 Q. Do you agree with my characterization?

24 A. I believe so, sir.

25 Q. Okay. And then on Tuesday, July 31, this record

1 indicates that the employee named Phillip Allen worked 16
2 hours. 16 regular hours, correct?

3 A. Correct.

4 Q. And on Thursday, August 1st, this record indicates
5 that the employee, Phillip Allen, worked 16 hours. Correct?

6 A. Yes.

7 Q. And on Monday, August 5th, this record indicates
8 that the employee named Phillip Allen worked 18 hours.
9 Correct?

10 A. Yes.

11 Q. Okay. Go down to the second line. This is the
12 line that indicates how many overtime hours the employee
13 worked, correct?

14 A. I believe so.

15 Q. Do you see any overtime hours on this second line
16 for Phillip Allen?

17 A. No, I do not.

18 Q. And right below that, that's the line for
19 double-time hours, correct?

20 A. I believe so.

21 Q. Do you see any entry for double-time hours on that
22 line?

23 A. No, sir.

24 Q. And right here (indicating), the number that I'm
25 pointing at right here, 88 hours, do you see that?

1 A. Yes, sir.

2 Q. That indicates that Mr. Allen worked 88 hours in
3 the week ending August 5th, 2002. Correct?

4 A. Yes, sir.

5 Q. That information is false, Miss Pawk, correct?

6 A. There may have been a situation where his
7 paperwork was not received timely, and that -- I don't do
8 the data entry. Payroll does. Possibly he had hours in the
9 previous time period, or they -- they doubled it and just
10 did it in the hours instead of the second line.

11 Q. You would agree with me that the information is
12 false.

13 A. I -- I don't know when his -- when his paperwork
14 came into the office. But -- I don't know if --

15 Q. You think this might -- this information might be
16 true.

17 A. I don't -- I'm not familiar enough with the coding
18 and the -- I don't know.

19 Q. Is there some question as to the reliability of
20 this document, based on the information that we just
21 reviewed? In your mind, is there some question?

22 A. I don't know why it reflects that.

23 Q. Answer my question, please. Is there a question
24 in your mind as to the reliability of this record?

25 THE COURT: Ma'am, can you answer.

1 A. Yes. I don't understand why it says that. Yes, I
2 don't understand that.

3 Q. So if there's some question as to the reliability
4 of this record with regard to the issue of total hours
5 worked, it's reasonable to assume that there might be other
6 aspects of this record that are also not reliable. You
7 would agree with that.

8 A. I have one question, sir.

9 Q. Please answer my question first.

10 A. Oh, I'm sorry. It looks to me that there is five
11 times 16, which is 80, not 88. And that there was eight
12 hours -- I'm not sure how they got the eight. But it looks
13 to me that he was on payroll earlier; that the time sheets
14 did not arrive on time, sir.

15 Q. Please answer my question.

16 A. Okay. We have to pull the manual time record to
17 see what happened here, sir.

18 Q. Again, you're not answering the question.

19 THE COURT: State your question again.

20 MR. MATESIC: Sure.

21 Q. My question is, based on the question in your mind
22 about the reliability of this document, which you said is
23 based on the number of hours recorded for John Allen, it's
24 reasonable to assume that there may be other aspects of this
25 document that are also unreliable. It's reasonable to

1 assume that. You would agree with me.

2 A. No, I wouldn't make that assumption. I would
3 assume the paperwork -- they can only enter them as of the
4 date they received the paperwork. And if this is her [sic]
5 previous workweek, which it looks like obviously it is, that
6 that's why it's entered that way. You would have to ask
7 payroll.

8 Q. So in every other respect, with the exception of
9 Phillip Allen's case, in every other respect, this document
10 is 100 percent accurate. Is that what you're saying?

11 A. I'm saying I believe Phillip Allen's paperwork
12 must not have arrived in a timely fashion --

13 Q. You're not answering my question.

14 MR. MATESIC: I apologize.

15 THE COURT: Now, look it.

16 MR. MATESIC: I'm sorry?

17 THE COURT: I'm going to say it again. Let's not
18 talk over each other. Let's wait until you finish. And
19 after this, move on to another area.

20 MR. MATESIC: I will.

21 A. Please restate your question, sir.

22 MR. MATESIC: Would you read back my question,
23 please.

24 (Record read back by the reporter.)

25 A. I don't know.

1 Q. If you don't know whether it's the case that every
2 other piece of information on this document is reliable,
3 then it's reasonable for me to question the fact -- it's
4 reasonable for me to question the fact as to whether or not
5 Mr. Allen worked on Saturday, August 3rd.

6 MR. LUTZ: Objection, Your Honor. Whether it's
7 reasonable for him to question or not is irrelevant.

8 THE COURT: Sustained.

9 Q. This is still Plaintiff's Exhibit 14. Do you see
10 where I'm indicating, Miss Pawk?

11 A. Yes, sir.

12 Q. August 12, 2002. This is the week following
13 August 5th, 2002, correct?

14 A. (No response.)

15 Q. Excuse me. This is the week which follows the
16 week that ended in August -- that ended as of August 5th,
17 2002.

18 A. Correct.

19 Q. And on this time record, we see John Bell's name
20 for the first time.

21 A. (No response.)

22 Q. He wasn't on the previous week's record.

23 A. Correct.

24 Q. He was on this week's record. Correct?

25 A. Correct.

1 Q. And what is the first day that you show in this
2 record that John Bell worked for Cost Company?

3 A. I show that payroll received paperwork that he --
4 that he -- on August 6th. That he was working.

5 Q. So that's his first day of work.

6 A. Based on this record, yes. This is not the actual
7 manual time sheets, sir.

8 Q. And you will agree with me that you -- this record
9 indicates that on Thursday of that week, Friday of that
10 week, and Monday of the following week, this record
11 indicates that Mr. Bell worked a double shift; 16 hours a
12 day.

13 A. It could be that he worked a double shift, but you
14 would have to pull the time sheet, because it's possible
15 that his paperwork -- because this was an out-of-town job --
16 did not arrive in a timely fashion, sir.

17 Q. You would agree with me that there is some
18 question in your mind as to the reliability of this
19 representation right here; 16 hours of regular time worked
20 on Thursday, August 8th. There's some question in your mind
21 as to whether that's a reliable figure.

22 A. I don't know.

23 Q. If you don't know, that means there's a question
24 in your mind, correct?

25 A. I don't know.

1 Q. That job was still going on, in October of 2002,
2 wasn't it? That job being the SCI Marienville job.

3 A. I believe it was winding down in October of 2002,
4 sir.

5 Q. Okay. I'm placing before you now the last section
6 of Plaintiff's 14. You can identify this for us, please,
7 Miss Pawk. This is the payroll -- the certified payroll
8 record for the week ending October 28th, 2002, correct?

9 A. Yes, sir.

10 Q. Do you know how many mason tenders Cost was
11 employing at the SCI Marienville site during the week ending
12 October 28th, 2002?

13 A. I do not know, sir.

14 Q. Well, Miss Pawk, I have had the opportunity to go
15 through these payroll records. And my count is that as of
16 the week ending October 28th, 2002, there were a total of
17 115 Cost employees on that job site; 47 of whom were mason
18 tenders, and one of whom -- well, I'll just stop right
19 there. 47 of whom were mason tenders. Do you have any
20 reason to doubt that number?

21 A. No, sir.

22 MR. MATESIC: Can we get a stipulation on this
23 number?

24 MR. LUTZ: Are you telling me that you accurately
25 counted them?

1 MR. MATESIC: It's right here.

2 Q. 47 mason tenders --

3 THE COURT: Well, was there a stipulation or
4 wasn't there?

5 MR. LUTZ: We'll so stipulate, Your Honor.

6 THE COURT: All right.

7 MR. MATESIC: And I believe the prior stipulation
8 was that as of the week ending August 12th, 2002, there were
9 57 mason tenders.

10 MR. LUTZ: I don't remember the specific numbers.
11 If you say so, that's fine.

12 BY MR. MATESIC:

13 Q. I'm turning to the fourth page in this record,
14 Miss Pawk.

15 A. Yes.

16 Q. Do you see that in front of you? On the line for
17 regular hours for this employee, how many regular hours are
18 reported for this employee on October 22nd, 2002?

19 A. 24.

20 Q. How many hours are reported for Wednesday, the
21 following day?

22 A. 16.

23 Q. How many hours are reported for the next day?

24 A. 16.

25 Q. How many hours are reported for the next day?

1 A. 16.

2 Q. Do you know who this employee is?

3 MR. LUTZ: Your Honor, I object. He has a tab
4 over the -- over the employee's name on the document he's
5 showing her.

6 MR. MATESIC: I'll show it to her in a minute.

7 MR. LUTZ: Well --

8 MR. MATESIC: I'll show it to her in a second.
9 Right after she answers the first question.

10 THE COURT: Hang on a second.

11 MR. LUTZ: It's grossly unfair to ask her to
12 memorize documents and ask her a question --

13 THE COURT: How would she know who the employee
14 is, unless she sees the name?

15 MR. MATESIC: No. I just want to know, is she
16 aware of an employee at Cost --

17 BY MR. MATESIC:

18 Q. You would agree with me, Miss Pawk, that it is an
19 extraordinary circumstance for an employee to work --

20 MR. MATESIC: I'll withdraw the question for right
21 now, Your Honor.

22 Q. It's an extraordinary circumstance for an employee
23 at Cost to work 24 hours in one day.

24 A. Yes.

25 Q. And it's extraordinary for that same employee to

1 then on the next day work 16 hours.

2 A. I believe you need to pull the -- excuse me. I
3 believe you need to pull the manual time sheet. There could
4 be a shortage of persons; they could have been missed on the
5 time sheet for the preceding work, and that is how they
6 would document it. These payrolls are generated weekly, and
7 they have to have their paperwork. It looks in alphabetical
8 order like this person is Bell, because of the name below
9 it.

10 I don't collect the time sheets, I don't do the
11 data coding. I don't understand this. It looks to me like
12 they were missed on a previous time sheet.

13 Q. This is John Bell.

14 A. If there were many workers, people get missed. It
15 happens all the time, sir, and they issue shortages.

16 Q. You would agree with me, this is John Bell?

17 A. Yes, sir.

18 Q. This is the same John Bell -- this is the same
19 John Bell who in the week ending August 12th, 2002 -- the
20 same John Bell who in the week ending August 12th, 2002, has
21 a payroll record which reflects that he worked 16 hours on
22 Thursday, August 8th, 16 hours on Friday, August 9th, and
23 that his first day of employment with Cost was August 6th.
24 The same guy. Answer my question, please. It's the same
25 John Bell.

1 A. It appears to be.

2 Q. And this is the same John Bell who joined the
3 union on August 1st, 2002.

4 A. The workers received their paychecks on Thursday.
5 Apparently on Thursday, he must have realized he was missed
6 on the time sheet for the previous week, so she bumped up
7 his hours on Thursday and Friday to accommodate that on
8 Monday. He must have started prior to, and the paperwork
9 did not arrive at the job site. That happens frequently.
10 People are missed on job sites. Very often. And it's
11 called a shortage. But you have to pull the actual manual
12 time records.

13 So -- and that can happen frequently. It can
14 happen in October, it can happen in August, it can happen
15 all the time --

16 THE COURT: Wait for a question.

17 Q. Let me ask my question. This is an unreliable
18 representation, isn't it? 24 hours on October 22nd, that's
19 unreliable.

20 A. It's possible, because two people have the same
21 last name, someone got missed. I am not going to state
22 whether it's unreliable or not. I would need to see the
23 manual records sir; this time sheet that Dean Taylor would
24 fill out, sir.

25 Q. You submitted that record to the Commonwealth of

1 Pennsylvania.

2 A. Excuse me? Your question?

3 Q. The record that we just looked at, October 28th,
4 2002.

5 A. Payroll submitted it, and I signed it.

6 Q. Yeah, this one right here (indicating). You sent
7 that to the Commonwealth of Pennsylvania. You did?

8 A. Yes. And clearly there's a shortage.

9 MR. MATESIC: Nothing further.

10 THE COURT: All right. Do you have anything?

11

12 CROSS-EXAMINATION

13 BY MR. LUTZ:

14

15 Q. Good morning.

16 A. Good morning.

17 Q. Georgia, I hope you don't object; I'm going to
18 refer to you as Georgia, so there's no confusion in the
19 record with respect to you and Mr. Pawk. Is that okay?

20 A. Not a problem, yes.

21 Q. Georgia, let's talk about what we are here for;
22 Kathleen Brown. When did you first become aware of --

23 THE COURT: Use the microphone, please. As a
24 matter of fact, can you move your material right onto it.

25 BY MR. LUTZ:

1 Q. When did you first become aware that Kathleen
2 Brown was seeking employment with Cost Company?

3 A. On September 18th of 2002.

4 Q. And how did you become aware that Kathleen Brown
5 was seeking employment?

6 A. I received a partially completed Female
7 Recruitment Minority Referral Memorandum with a resume
8 attached under my door.

9 Q. I have placed on the screen in front of you
10 Defendant's Exhibit U-4. Is that the document you were just
11 referring to?

12 A. Yes.

13 Q. And what did you do after you received that
14 document?

15 A. I perused the attached resume that was stapled to
16 it. I read the document in its entirety, and I paid
17 particular attention to her operating engineer experience,
18 sir.

19 Q. Were you excited because you received her resume?

20 A. Oh, yeah. I was thrilled. I couldn't believe
21 this female was in the operating engineers. We love having
22 females as operators because they keep the boom or the arm
23 of the crane meticulous, the inside of the cab is
24 meticulous, the fire extinguisher is there, the operator's
25 manual. Everything is in order. We have had several

1 operators, Sally Milligan, Tina Rich --

2 Q. Georgia, what --

3 A. -- Diane Angel, and they all have done a wonderful
4 job for us. I was excited. It appears she had been
5 certified by the International Union of Operating Engineers,
6 which is Local 66, so I was thrilled. I wanted to try to
7 call and talk to her. I dialed information. I tried
8 different area codes. I tried to find the number. I could
9 not locate a phone number. I wanted to speak with her.

10 Q. We'll get back to that. Let me back up for a
11 second.

12 THE COURT: Listen to the question and answer the
13 question.

14 Q. On her resume, Georgia, on Kathleen Brown's resume
15 that you received, it indicated that she was certified by
16 the operator's union; is that correct?

17 A. Yes.

18 Q. All right. And that was what type of
19 certification, when it says -- it says on there "operation
20 of forklift". What type of a certification is that? Do you
21 understand my question?

22 A. No.

23 Q. Did you understand what type of certification
24 Kathleen Brown had?

25 A. Yes. She could operate a forklift alone.

1 Q. Are there different types of operators in the
2 operators' --

3 A. Yes.

4 Q. Please. You let me finish me question, take a
5 breather, and then I'll go ahead. Are there different types
6 of operators in the operators' union?

7 A. Yes.

8 Q. Are there different levels of certification?

9 A. Yes.

10 Q. What are the levels of certification?

11 A. I believe there is -- there is different levels
12 and different classes of certification. There is the --
13 possibly it's called Level A or Level 1, which is the crane
14 operators, and the ones that have the ability to run various
15 equipment or all of the equipment.

16 Q. Now, based on what you saw on Kathleen Brown's
17 resume, was she a Level 1 operator?

18 A. No, I do not believe so.

19 Q. All right. When she indicates that she drives a
20 forklift, what level operator would that be, that drives a
21 forklift?

22 A. I believe it's below C.

23 Q. Below C. Okay.

24 A. Or below the first two levels, sir.

25 Q. Now, could you explain for us your understanding

1 of how these different operators are classified and what
2 they are permitted to do with the operators' union and on
3 your job sites.

4 A. It's my understanding that if you are a Level 1 or
5 a Level A operator, you are permitted to run all types of
6 cranes and all forklifts and all rough-terrain vehicles, and
7 you could be assigned to a crane, and you -- at a job site,
8 and if there's a forklift at the job site as well, you were
9 allowed to make a machine change, get on the forklift, do
10 forklift lifts, and then go back to the crane.

11 So you would be permitted, if you had equipment --
12 crane is A, let's say a forklift is B, and let's say another
13 vehicle is C. You would be permitted to be on the crane and
14 go A to B to C, or to go A, then go to Machine B, do lifts,
15 and then go back to A. You can make two moves. That's it.
16 You can go A to B to C and stay at C, or you can go A to B
17 and back to A.

18 Q. Now, the fact that Kathleen Brown had only this D
19 certification, would that limit what she was available to do
20 on your job sites?

21 A. I believe so. She would not be allowed to run the
22 crane.

23 Q. Now, let's go back to Kathleen Brown and you
24 receiving this resume. By the way, I put the first page of
25 the resume back up, Defendant's Exhibit E-5. Are there

1 dates in the laborers' section of that resume?

2 A. Yes.

3 Q. And what do those dates show?

4 A. May 2002 to August 2002.

5 Q. And this resume was attached to the recruitment
6 memo that came back to your office?

7 A. Yes.

8 Q. And that came into your office, I believe you
9 said, on September --

10 A. 18th, 2002.

11 Q. And when did you write to Kathleen?

12 A. September 18th, 2002.

13 Q. And when is the next time you heard from Kathleen
14 after you wrote that letter to her?

15 A. October 29, 2002.

16 Q. On October 29, 2002, what happened?

17 A. I believe I received a phone call from Kathleen,
18 and she expressed an interest in working for Cost as an
19 operating engineer.

20 Q. Tell us about the conversation. What was
21 discussed?

22 A. I told her I was very impressed with her resume, I
23 was very excited that she got my note, because I wasn't --

24 Q. Slow down a little bit.

25 A. I'm very sorry. I was very excited that she was

1 able to contact me, because I had jotted a handwritten note
2 and put it in an envelope and wasn't sure it was going to
3 get to her. And she called and said she received my note.
4 And I told her I received her resume, and I was very
5 impressed that she was a forklift operator.

6 And then I believe she told me that -- actually,
7 she had let her book lapse; her certification with the
8 International Union of Operators, Engineers 66 lapse.

9 Q. Did she ever tell you whether or not she was in a
10 laborers' union?

11 A. We never discussed a laborer position or laborers'
12 union or anything of that sort.

13 Q. Did she mention in the oral conversations that you
14 had on the telephone, whether she had any interest in being
15 a laborer?

16 A. No, she did not.

17 Q. Did she ever discuss with you the duties
18 pertaining to a mason tender position?

19 A. No.

20 Q. Did she ever use the words "mason tender" in her
21 discussions with you on the telephone that day?

22 A. No, she did not.

23 Q. Did she ever indicate in any way, shape, or form
24 that she was interested in some other type of laborer's
25 position on that day?

1 A. No.

2 Q. How long did this conversation last?

3 A. It was -- I don't know. About five to 10 minutes.

4 Q. And how did you leave it with her? What was the
5 next step?

6 A. I told her that I thought that she should try to
7 reactivate with the Operators, Engineers, and I wanted to
8 see if she was willing to travel. I -- I don't recall if I
9 put her on hold and called Dean to say, hey, you know,
10 Kathleen called me and I want her hired, and then Dean said,
11 Georgia, we're done. And I think I may have said to her,
12 listen, if I can't -- if I don't have a position for you at
13 Marienville Prison, would you be willing to travel to
14 another job site, to Pittsburgh or to Erie, and I believe
15 she indicated she was willing to travel. And I was very
16 excited. And I gave her Mr. Cramer's phone number, and I
17 asked her to please contact Mr. Cramer --

18 Q. Who is Mr. Cramer?

19 A. Jack Cramer is a project manager. And he was
20 going to be running -- possibly had already started running
21 the Erie Federal Courthouse project right here.

22 Q. So did you discuss specific locations with her as
23 to where you might be able to assist her in getting an
24 operator's position?

25 A. Yes.

1 Q. You mentioned Erie and you mentioned Pittsburgh.
2 Did you discuss any other specific locations?

3 A. She was very excited about Erie. I think she
4 stated that it was close to where she was then living. I
5 think she maybe had moved -- I'm not exactly sure. But she
6 had moved, and she was excited about working in Erie. I
7 gave her Mr. Cramer's Nextel number and told her to please
8 contact him, and I was just thrilled to have her.

9 Q. Did you assist her in any way in contacting the
10 operators' union, Union 66?

11 MR. MATESIC: Your Honor, I have to place an
12 objection on the record at this point. I think what we're
13 doing is merging the cross-examination with the direct
14 examination. And given that, there is prohibition against
15 asking leading questions on direct. I think I have a valid
16 objection to the manner in which Mr. Lutz is posing his
17 questions.

18 THE COURT: Overruled. Go ahead.

19 BY MR. LUTZ:

20 Q. Did you assist her in getting into or attempting
21 to get into Operators' Union 66?

22 A. I believe so, yes.

23 Q. What did you do?

24 A. I told her that I wanted her to try to reactivate,
25 and that she -- that we needed to contact Local 66. Dennis

1 Manown, I believe was the president at the time. And if she
2 wanted me to do anything -- I think she said that she was
3 going to take care of straightening that out.

4 Q. If someone is in the operators' union, do you know
5 if they can be in the laborers' union at the same time?

6 A. It's my understanding that you cannot carry two
7 books at the same time.

8 Q. When you say "carry a book", does that mean
9 belonging to the union or having a union --

10 A. Yes.

11 Q. -- or having a union card?

12 A. Yes. Carrying a book means carrying union
13 certification.

14 Q. So when she told you that she was in the
15 operators' union, did you have any reason to believe that
16 she was in the laborers' union?

17 A. No.

18 MR. MATESIC: Pardon me. Just for the record,
19 Your Honor, I'm placing a continuing objection, based on my
20 prior --

21 THE COURT: Mr. Matesic, do me a favor -- and this
22 is because I need people to stand up to hear you better.
23 For future objections, get on your feet.

24 MR. MATESIC: Sure.

25 THE COURT: I'm sorry; a continuing objection to

1 what?

2 MR. MATESIC: Well, based on -- I can't object to
3 his leading questions. And I just wanted, for the
4 remainder --

5 THE COURT: No, you don't get a -- under the
6 rules, you object as the questions are asked. If you think
7 it's a leading question, I'll be happy to rule answer by
8 answer. Go ahead. Or I should say question by question. I
9 apologize. Go ahead.

10 BY MR. LUTZ:

11 Q. Georgia, when --

12 A. Yes.

13 Q. -- when did you first learn that Kathleen Brown
14 was interested in a laborer's position with Cost Company?

15 A. When I first received the EEOC complaint and I
16 reviewed it. And I was shocked. We had never discussed a
17 laborer's position whatsoever.

18 Q. What had you discussed prior to your receipt of
19 that EEOC complaint?

20 A. Her getting an operator's position. Possibly at
21 Erie.

22 Q. After you received the EEOC complaint, did Cost
23 offer her a laborer's job?

24 A. Yes, we did.

25 Q. And what did she do in response?

1 A. She refused it.

2 MR. LUTZ: No further questions.

3 THE COURT: All right. Anything further with this
4 witness, Mr. Matesic?

5 MR. MATESIC: Just a few.

6

7 REDIRECT EXAMINATION

8 BY MR. MATESIC:

9

10 Q. You said that the first time that you learned that
11 Kathleen Brown was seeking a laborer's position was during
12 your phone call -- excuse me -- was after she filed the
13 complaint with the EEOC.

14 A. Yes.

15 Q. Okay. Placing before you Defendant's Exhibit U-4.
16 You have seen this already today, correct?

17 A. Yes.

18 Q. Okay. Does this not indicate that she was seeking
19 a laborer's position?

20 A. It said "operator, laborer, resume attached," dot,
21 dot, dot.

22 Q. Does it not indicate that as of September 19th,
23 2002, she was seeking a laborer's position?

24 A. It states she's interested in an operator first,
25 laborer. You can't be both, sir.

1 Q. When was the EEOC case filed?

2 A. I don't know when she filed exactly.

3 Q. What is the date of your response? Do you know
4 that?

5 A. I don't specifically recall.

6 Q. I am placing before you Plaintiff's Exhibit 24.
7 All right? Give me one second. Now, this is the same
8 memorandum that we were looking at a moment ago. And the
9 difference is that someone has circled this date. And I
10 will stipulate with counsel that it was my client who did
11 that. All right? Do you understand, Miss Pawk?

12 A. Fine.

13 Q. All right. Now, you agree with me that Cost
14 received this memorandum on September 19th.

15 A. I received that memorandum with the resume
16 attached, I believe on September 18th, 2002.

17 Q. I apologize. September 18th. All right. Now,
18 turning to the second page of Exhibit 24, do you see what
19 I'm pointing to down in the lower right-hand corner, Exhibit
20 B-2? Do you see that?

21 A. Barely.

22 Q. Okay. That's Cost's exhibit that they attached to
23 the EEOC response. Correct?

24 A. Yes.

25 Q. And this shows that Kathleen Brown filled out a

1 second minority recruitment memorandum that was dated
2 August 15th, 2002. Correct?

3 A. Correct.

4 Q. So this is the second Minority Recruitment
5 Memorandum that Cost received from Kathleen Brown.

6 A. And we received that with her subsequent resume
7 attached, which was printed October 4th, 2002. And I
8 believe she did that in response to receiving my note, and
9 she filled in the contact number.

10 Q. Okay. And what position is she asking for on that
11 second page of Exhibit --

12 A. This time she states laborer, operator; three to
13 five years operating engineers; laborer, Department of
14 Conservation and Natural Resources; forklift certification;
15 four years construction.

16 Q. This information right here, that's consistent
17 with the information that she put on her resume, isn't it?

18 A. It's very similar.

19 Q. Now, turning to the third page in Exhibit 24 --
20 and, once again, I'll stipulate that the handwriting up here
21 and the circling of the words was done by my client. Do you
22 see the date, August 15th, 2002?

23 A. Yes, sir.

24 Q. Down at the bottom, do you see Kathleen Brown's
25 name?

1 A. Yes, I see her name.

2 Q. And do you see what she has written in there under
3 her address?

4 A. I see what's written there. I have never seen
5 this document, sir.

6 Q. Okay. So you never saw a document which
7 Kathleen -- before the EEOC case was filed, you never
8 received a document in which Kathleen had indicated that she
9 had given this form to the person in charge at the Cost work
10 site at Marienville.

11 A. No, I have never seen this Document 1008, sir.

12 THE COURT: Start wrapping it up.

13 Q. Mr. Lutz was asking you about how excited you were
14 that this female, Kathleen Brown, had expressed an interest
15 to work for Cost Company. You were excited by that, right?

16 A. Yes. I'm one of four daughters. I am a mother of
17 three children, two of which are females. Ever since I was
18 a little girl, I spent weekends with my father and my
19 sisters on his red pickup truck going job site to job site.
20 I love having females and qualified persons run our
21 equipment. I was excited. We love getting females,
22 minorities. Anyone that's qualified, we want to hire.

23 Q. It's fair to say you would kill for the chance to
24 get a female foreman.

25 A. I shouldn't say kill, but, yeah, I would love to

1 have a bricklayer foreman as a female. I would love to have
2 females, minorities, absolutely. I am a woman in
3 construction.

4 Q. But you have used that terminology before, right?
5 I'd kill to --

6 A. I believe in my deposition, I did use the word
7 "kill", which was probably inappropriate, yes.

8 Q. Now, it would help you to hire a female if you
9 knew --

10 A. I tried to hire Miss Brown --

11 THE COURT: Excuse me. Please wait until he
12 finishes.

13 Q. It would help you in your efforts to hire a female
14 if you knew you, Georgia Pawk knew, whether a female had
15 ever gone to Cost's work site at Marienville asking for a
16 job. That would be helpful to you, wouldn't it?

17 A. Yes, it would.

18 Q. Okay. But you don't have records of who shows up
19 at those work sites. Right?

20 A. I personally do not have knowledge --

21 MR. LUTZ: Objection, Your Honor. We have been
22 through this records issue before, and it's repetitive --

23 THE COURT: Sustained. Sustained.

24 BY MR. MATESIC:

25 Q. Let me ask it this way: We went over this

1 yesterday. This is Defendant's Exhibit W-1. These are all
2 the Minority Recruitment Memoranda that have the stamps with
3 the dates on which they were received by Cost. Correct?

4 A. I can't see them all, sir.

5 Q. Okay. I'm just going to summarize --

6 THE COURT: Excuse me. Excuse me. I have got to
7 deal with one thing at a time.

8 MR. LUTZ: Your Honor, I object. It's beyond the
9 scope of my examination of Miss Pawk. He's getting into new
10 matters again. And it's also been asked and answered
11 yesterday --

12 THE COURT: Were these the documents that were
13 reviewed yesterday?

14 MR. MATESIC: Yes, they were.

15 THE COURT: Sustained.

16 MR. MATESIC: Your Honor, I have the right to
17 impeach the witness, based on her answers to Mr. Lutz. And
18 this line of questioning goes towards that goal.

19 MR. LUTZ: It has nothing to do with what I asked
20 her on my direct examination of her.

21 THE COURT: All right. I'll let you -- I'll let
22 you go for a few minutes if it's impeachment. But we are
23 breaking in three minutes for lunch, and, if possible, I
24 would like to conclude with this witness.

25 BY MR. MATESIC:

1 Q. One of the things that helps you -- hang on a
2 second. You keep these documents on file. All of these
3 documents that we went over yesterday with a date stamp, you
4 keep them in a file, right?

5 A. I have binders for jurisdictions and job sites.

6 Q. And what does this sentence right here
7 (indicating) say? "At this time we may not be accepting
8 employment applications. However, in the future, should we
9 be commencing new projects and need additional manpower, we
10 would like you to inform us of any individuals who might be
11 interested in those jobs." Correct?

12 A. Correct.

13 Q. Okay. So what this stack of papers represents is
14 a stack of names of people who want to get hired by Cost,
15 right?

16 A. Yes.

17 Q. Now, if you don't know -- if you don't know the
18 total number of people who come to you seeking work, how are
19 you in a position to figure out whether you're going to be
20 able to fill a vacancy with one of these people?

21 A. I wouldn't know the number of persons that would
22 come to a given job site if it was not communicated to me.

23 Q. Your object is to put those people, if they are
24 women -- you said -- this is what you said, right here
25 (indicating). Do you see where I'm indicating? Page 79.

1 "I would love -- I would kill for a female foreman, but I
2 don't think that there are any." Do you see that?

3 A. Yes.

4 Q. Those are your words.

5 A. Absolutely. I would love any females. Any
6 qualified persons in any of our trades that we are assigned
7 with.

8 Q. And if you don't know if there are vacancies or if
9 there are applications that are coming in, how are you in a
10 position to put these people into jobs?

11 A. Because to my knowledge, we don't have
12 applications. To my knowledge, we hire directly from the
13 hall.

14 Q. And that's exactly my point. Thank you.

15 A. And we refer to the hall.

16 MR. MATESIC: Nothing further.

17 THE COURT: All right.

18 MR. LUTZ: We have no further questions. Your
19 Honor, I'd ask for Miss Pawk to be excused.

20 THE COURT: She's excused. We're going to be --
21 I'm going to say we're going to take an hour, but apparently
22 that was inadequate the last time. Take an hour and 15
23 minutes.

24 (Recess held from 12:06 p.m. till 1:30 p.m.)

25 THE COURT: All right, Mr. Matesic.

1 MR. MATESIC: Thank you, Your Honor. Plaintiff
2 calls William Heaton.

3 THE COURT: Sir, if you'd be so kind as to come up
4 here. And spell your last name for the benefit of my court
5 reporter.

6 THE WITNESS: It's H-E-A-T-O-N.

7

8 W I L L I A M H E A T O N, first having
9 been duly sworn, testified as follows:

10

11 DIRECT EXAMINATION

12 BY MR. MATESIC:

13

14 Q. Good afternoon.

15 A. Good afternoon.

16 Q. Mr. Heaton, you are a sub foreman with Cost
17 Company?

18 A. Yes, I am.

19 Q. I just have a few questions for you. In 2002, you
20 were the sub foreman at the Cost Marienville Prison site,
21 correct?

22 A. Yes, I was.

23 Q. And at the time you were the sub foreman -- strike
24 that question. In the early part of that year, when you
25 arrived at that site, you were in charge of hiring personnel

1 to work for Cost?

2 A. No, I was not. Not in 2002.

3 THE COURT: Would you pull in just a little bit,
4 sir.

5 Q. In 2002 --

6 MR. PAWK: I'm sorry, Judge. If he could pull the
7 microphone. I can't hear him.

8 THE COURT: What was your answer to that last
9 question?

10 THE WITNESS: No, I was not in charge of hiring in
11 2002.

12 Q. You were in charge of hiring for Cost at some
13 other time?

14 A. Yes, I was.

15 Q. Okay. Dean Taylor joined that job site in April,
16 approximately, 2002?

17 A. No. I believe he come in December of 2001.

18 Q. Well, let me ask it this way: After Dean Taylor
19 arrived on the job, he was doing the hiring at that job
20 site, correct?

21 A. Correct.

22 Q. Was anybody hiring on that job site before Dean
23 Taylor?

24 A. For Cost Company or for --

25 Q. Did Cost have work going on before Dean Taylor

1 arrived in December of 2001?

2 A. On that site or --

3 Q. Yes, on that site.

4 A. Can you repeat the question, please.

5 Q. Sure. The point I'm getting at, Mr. Heaton, is
6 who from Cost had the power to hire employees to work on
7 that site leading up to the summer of 2002? Now, you would
8 agree with me that Dean Taylor was hiring people for Cost
9 during the year 2002.

10 A. Correct.

11 Q. In fact, your testimony is that he joined that job
12 site or he arrived on that job site in December of 2001.

13 A. Correct.

14 Q. Okay. Did anybody else before Dean Taylor arrived
15 in December of 2001, did anybody else for Cost hire people
16 to work on that site?

17 A. In 2001 or 2002?

18 Q. 2001.

19 A. I hired in 2001.

20 Q. You hired in 2001.

21 A. Yes.

22 Q. Okay. All right. You're familiar with the hiring
23 practices of Cost Company, since you've worked in that
24 capacity?

25 A. Yes, I am.

1 Q. All right. Now -- and you're familiar with the
2 events that arise during the course of a construction season
3 with regard to hiring. And when I say the issues that
4 arise, I'm talking about the scarcity of labor.

5 A. (No response.)

6 Q. Do you understand my point?

7 A. No, I do not.

8 Q. The construction season peaks at some time during
9 the summer.

10 A. Yes.

11 Q. On average.

12 A. Yes.

13 Q. All right? So in the months before summer, the
14 workforce is expanding. It's growing. You're hiring
15 additional employees, correct?

16 A. Pertaining to what job?

17 Q. The Marienville job site. That's -- all my
18 questions go to the Marienville job site.

19 A. Okay.

20 Q. Okay?

21 A. All right.

22 Q. You would agree with me, in the months before
23 summertime, Cost is hiring more and more employees, until
24 some point in the summer their total number of employees
25 reaches a peak.

1 A. Correct.

2 Q. All right. That peak in 2002, that occurred when?

3 A. I'm not really familiar with that, sir.

4 THE COURT: That's a stipulated fact.

5 MR. MATESIC: I'm sorry?

6 THE COURT: That's stipulated to. The peak is
7 stipulated to, if I remember correctly.

8 MR. MATESIC: I think the peak is, is that there
9 was a peak as of July 31st, 2002 [sic].

10 THE COURT: Well, I don't want to misrepresent
11 what I thought you gentlemen agreed to, but I'm just trying
12 to obviate the need for proof on a point that has already
13 been established.

14 MR. PAWK: I believe that we stipulated that the
15 highest number of employees that Cost had on that project
16 was the week of -- I can't remember. Was it ending
17 August 5 or August --

18 THE COURT: That's my recollection.

19 MR. MATESIC: Right. I have a slightly different
20 question, but I'll withdraw it.

21 BY MR. MATESIC:

22 Q. Mr. Heaton, on a yearly basis, the people who
23 exercise hiring powers by Cost are required to attend a
24 meeting in which Cost's equal employment policy is
25 discussed.

1 A. That is correct.

2 Q. All right. And you attended such a meeting this
3 year, correct?

4 A. No. I have not.

5 Q. All right. Did you attend the one last year?

6 A. Can I restate?

7 Q. Sure.

8 A. Can I explain, please?

9 Q. Sure.

10 A. I didn't attend a meeting this year, because this
11 year's meeting hasn't happened yet. In place of this year's
12 meeting, we were doing certification for CPR and first aid.

13 Q. So you haven't had your equal employment meeting
14 yet.

15 A. Correct.

16 Q. But in all prior years, those meetings occur early
17 in the year, before the construction season peaks.

18 A. They could either occur in the -- depending on
19 when our slow time is.

20 Q. And Georgia Pawk, the Equal Employment Opportunity
21 Officer presides over that meeting.

22 A. Yes, she does.

23 Q. Georgia Pawk never went to you and indicated that
24 she believed there was any problem with regard to sex
25 discrimination at Cost; is that fair to say?

1 A. Referring to what job?

2 Q. You understand that Cost has an equal employment
3 policy.

4 A. Correct.

5 Q. And that policy applies in the context of hiring.

6 A. Correct.

7 Q. And that policy says that with regard to hiring,
8 no applicant can be discriminated against on the basis of
9 gender.

10 A. Gender, race, color, creed.

11 Q. Among them --

12 A. Sex.

13 Q. Right. Georgia Pawk never went to you and said
14 she believed that Cost had a problem with regard to
15 discrimination in the context of hiring.

16 A. At the Marienville Prison?

17 Q. Right.

18 A. No, she never did, sir. Never.

19 MR. MATESIC: That's all I have.

20 THE COURT: Anything else?

21 MR. PAWK: Just a few questions, Judge.

22 THE COURT: All right.

23

24 CROSS-EXAMINATION

25 BY MR. PAWK:

1 Q. Mr. Heaton, how long have you been working for
2 Cost Company?

3 A. I believe it's in -- in the capacity of a foreman?

4 Q. In any capacity.

5 A. Any capacity? I started in 1986.

6 Q. All right. And how long have you been a foreman?

7 A. For five years.

8 Q. And you worked on the Marienville prison project?

9 A. Yes, I did.

10 Q. Were you there for its entire duration?

11 A. No, I was not.

12 Q. Tell me when you were there and when you weren't
13 there.

14 A. I left the site briefly on August 6th, and I
15 returned on August 13th. And then left again sometime in
16 September.

17 Q. Okay. Are you aware that one of the allegations
18 in this case is that Kathleen Brown met you on that site and
19 asked you for a job?

20 A. (No response.)

21 Q. Are you aware that she's alleged that?

22 A. Yes.

23 Q. Okay. And did that ever happen?

24 A. I never met Kathleen Brown.

25 Q. In fact, before you came to the courthouse earlier

1 this week, had you ever seen her?

2 A. I couldn't tell you what she looked like, up until
3 the courthouse.

4 Q. In fact, it's her testimony that she met you on
5 August 23, 2002. Did that ever occur?

6 A. No, it did not.

7 Q. Now, there's been other testimony in this case --
8 and I won't belabor this point. But do labor needs change
9 on a daily basis on a construction project for Cost?

10 A. Yes, it does.

11 Q. And you were familiar with the construction --
12 with the labor needs on this project.

13 A. Yes, I am.

14 Q. Would you describe how those labor needs may
15 change on a daily basis.

16 A. Every day there would be bricklayers calling and
17 saying that I'm done, I found a job closer to home. At
18 night we may find out, after the foremen come in, sub
19 foremen come in, that certain laborers wouldn't be back. So
20 they would have to rehire people.

21 Q. Do you know whether Cost needed any mason tenders
22 on July 31, 2002?

23 A. No, I'm not aware of any need.

24 Q. All right. Are you familiar with how the union
25 stewards, the laborers' union stewards would go and meet the

1 new off-the-street hires that Cost hired on that project?

2 A. A lot of times the steward wouldn't sign a
3 particular member up right away. They may work for a week
4 or a couple days before they -- he would actually sign them
5 up. Or he might meet with them that day, depending on where
6 he was on the site. I mean, it was a big site.

7 Q. All right. Do you know who Ron Barrett is, the
8 labor union business agent?

9 A. Yes. Yes, I do.

10 Q. He's testified in this case. And I don't think
11 you were in the courtroom when he testified, were you?

12 A. No, I was not.

13 Q. All right. And he testified he prepared a sheet
14 of individuals, a document of individuals that Cost hired
15 off the street on that project, and then those individuals
16 later joined the union. Okay? And he said that the start
17 date for an individual was an indication of when the steward
18 signed that person up. Okay?

19 A. Right.

20 Q. Is that an accurate record of when a mason tender
21 may have started on your project?

22 A. No, it wouldn't have been.

23 Q. Why?

24 A. Like I said before, that person may have started a
25 couple days before that, and it may have taken them time for

1 the steward to track them down on the site. Because we
2 really aren't -- I mean, we don't -- we really don't assist
3 the steward in the new hires. That's his job. That's not
4 our job. So he would have to find them and talk to them.

5 Occasionally, he would ask us if a -- if we hired
6 somebody new, and we would say yeah and then give the name,
7 and he would say, well, all right, I'll catch up to him.

8 Q. All right. And might that take more than a day?

9 A. Sure. Sure.

10 Q. Might it take more than two days?

11 A. Could have taken a week.

12 Q. Let me show you this Page 3 of an exhibit that
13 Mr. Barrett prepared. Do you see the first name there, John
14 Bell?

15 A. John V. Bell, yes.

16 Q. And he says -- it says, start date, August 1,
17 2002. Do you see that?

18 A. Yes, I do.

19 Q. Do you know from looking at that whether Cost
20 needed someone on July 31st, 2002? If he, in fact, started
21 on August 1, 2002.

22 MR. MATESIC: Objection, Your Honor. I think the
23 witness has already said he can't draw a conclusion based on
24 the representations of Mr. Barrett.

25 THE COURT: Well, overruled. You can answer that.

1 Go ahead.

2 A. I can't tell when he started from that paper, no.

3 MR. PAWK: No further questions, Your Honor.

4 THE COURT: All right, anything else?

5 MR. MATESIC: Just a few, Your Honor.

6

7 REDIRECT EXAMINATION

8 BY MR. MATESIC:

9

10 Q. Mr. Pawk asked you if labor needs changed on a
11 daily basis.

12 A. Yes.

13 Q. And that was the case during the summer of 2002?

14 A. Probably, yes.

15 Q. And there were occasions during that summer of
16 2002 when the union, Local 952 of the laborers' union, was
17 unable to refer people to the job site.

18 A. Like I said, I really wasn't doing the hiring in
19 2002, so I couldn't tell you when they had a shortage.

20 Q. Well, let me ask a more general question. That
21 project that you were working on, that was subject to a very
22 specific time constraint, wasn't it?

23 A. Yes, it was.

24 Q. Go ahead.

25 A. We had to be done by a certain time frame, yes.

1 Q. All right. In fact, you had a 90 percent
2 completion requirement by sometime later that year?

3 A. Yes, I believe so.

4 Q. Okay. That was, what, November of 2002?

5 A. I'm not sure of the date.

6 Q. Okay. So my question to you, Mr. Heaton, is this:
7 If you have a vacancy on July 31st, 2002, and you know that
8 you have got to meet this target date in November 2002, you
9 have got to hurry up and find somebody to stick in that
10 position. Would you agree with that?

11 A. Are you asking me if we had a vacancy on
12 July 2000, 31st [sic]?

13 Q. I'm just asking you as a general proposition. You
14 have a time constraint on that project. Suddenly, there's a
15 vacancy that needs to be filled. You know, because you hire
16 people for Cost -- you know, because Cost's projects are
17 subject to these time constraints, that the longer that
18 vacancy remains open, the more it's going to cost -- the
19 more expensive that project becomes. Because that increases
20 the risk that you're not going to make your target date.
21 You would agree with me.

22 A. (No response.)

23 Q. Let me say --

24 A. You lost me on that. Completely lost.

25 (Mr. Matesic writes on board.)

1 Q. You're familiar with that phrase?

2 A. Time is money, right.

3 Q. Time is money. Exactly. The longer a vacancy
4 remains open, the more expensive it becomes.

5 A. Correct.

6 Q. To the contractor.

7 A. Correct.

8 Q. All right. So you want to hurry up and put
9 somebody in that slot as soon as possible, don't you?

10 A. Yes.

11 Q. And if you had a stack of papers in front of you
12 of people who before July 31st had said to you, I'm
13 interested in working as a laborer, you would have an
14 immediate source of where you could go to find somebody to
15 stick in that slot, wouldn't you?

16 MR. PAWK: Objection, Your Honor. He's assuming
17 facts not in evidence.

18 THE COURT: Overruled.

19 A. We -- it's a general practice that we do not keep
20 numbers of people who show up for the job.

21 Q. Tell me that again.

22 A. We do not keep numbers of laborers who show up at
23 the job site.

24 Q. You have no records of the people who show up at
25 the Cost job site.

1 A. We have no record of laborers who show up at the
2 Cost job site.

3 Q. But there's been testimony in this case that the
4 Equal Employment Opportunity Officer maintains a file of,
5 among others, women who have expressed an interest in
6 working for Cost. The Equal Employment Officer testified
7 she maintains such a file.

8 A. She probably would back at the office, not on
9 site. We wouldn't have those stacks of files out in the
10 field. I mean, the only thing that we kept out in the field
11 is names of bricklayers that would show up at the site.

12 Q. I understand.

13 A. Laborers -- laborers, we called the hall for
14 laborers.

15 Q. I understand that. But when the hall couldn't
16 send you a laborer, then what? You had to find somebody
17 from off the street to do that job.

18 A. Sir, I never did that.

19 Q. It happened on that job site.

20 A. I'm not familiar with that practice, sir. As I
21 stated, sir, I did the hiring in 2001. I did not do any
22 hiring in 2002.

23 MR. MATESIC: One moment, Your Honor.

24 (Brief pause in proceedings.)

25 Q. Let me ask you the question this way: Cost has

1 hired mason tenders off the street.

2 A. Correct.

3 Q. Thank you.

4 A. Only -- excuse me. Can I finish? Only in very
5 rare occasions would we hire somebody off the street. The
6 hall would have to be completely empty. The business agent
7 would say, I have no one to give you. Only in that instance
8 could we hire off the street.

9 Q. But that's happened.

10 A. I believe it has.

11 Q. Fine. Thank you very much. Now, it would assist
12 you in filling that vacancy if you had sitting on your desk
13 in your Cost -- in Cost's trailer on that job site, it would
14 help you as the hiring person to have the name and the
15 contact information of a person who had expressed an
16 interest in working for Cost in the event that any opening
17 ever opened up -- ever occurred.

18 A. I believe I told you we did not keep a list of
19 that.

20 Q. I know. I know you didn't keep a list. And I'm
21 asking you a different question. What I'm asking you is,
22 if, in fact, Ms. Pawk, for example, had given you the name,
23 the address of a person who wanted to be a mason tender, if
24 you had that information in front of you on the day that a
25 vacancy arose, that would solve the problem for you,

1 wouldn't it?

2 A. (No response.)

3 Q. You wouldn't have to look for somebody coming in
4 off the street.

5 A. As I stated, we didn't keep those records on site.

6 Q. You're not answering my question.

7 A. I didn't understand your question. You're asking
8 me if I kept a record book of people on site, and I said no.

9 THE COURT: Mr. Matesic.

10 MR. MATESIC: Yes.

11 THE COURT: Do me a favor, will you? Try to
12 confine yourself to a certain space. We're wasting some
13 time.

14 MR. MATESIC: No problem.

15 (Discussion held off the record.)

16 MR. MATESIC: One moment, Your Honor.

17 (Brief pause in the proceedings.)

18 Q. I'm going to show you an example, Mr. Heaton.

19 A. Example of what?

20 Q. Get to it in a moment. Have you ever seen a form
21 like this (indicating) before?

22 A. Yes, I have.

23 Q. These go out in monthly payrolls?

24 A. Yes, they do.

25 Q. And this form instructs the employee that if they

1 know anyone who is interested in having a job with Cost,
2 that they should get the contact information from that
3 person, stick it on the bottom of this form, and get it back
4 into Cost's hands. Do you see that?

5 A. Yes.

6 Q. If you had such a document in front of you on the
7 day that you needed some -- to hire somebody off the street,
8 that document would assist you in hiring somebody. It would
9 make your job easier.

10 A. This document, when I receive this document, this
11 document is sent to the office. I do not keep this document
12 on file at the site. This document would either be mailed
13 in, if you were out of town, or sent back with the project
14 manager when he visited the project.

15 Q. I'm showing you what has previously been labeled
16 as Plaintiff's Exhibit 24.

17 A. Yes.

18 Q. Okay? Now, let's put the date aside for a moment.
19 If you needed a mason tender on a day that the union was
20 completely out of mason tenders to send to Cost --

21 MR. PAWK: Your Honor, I'm going to object.

22 Q. And you had this -- you had a piece of --

23 THE COURT: Hang on.

24 MR. PAWK: I'm going to object. He's already
25 testified this is not what they did, this is not what they

1 do. I don't understand the relevance of beating this over
2 and over. He's testified to what they do with these
3 documents.

4 THE COURT: Let me see you at side-bar.

5 (Whereupon the following discussion occurred on
6 the record at side-bar:)

7 THE COURT: What difference does it make if -- if,
8 for instance, if they would have done something, then,
9 according to your theory, they would have been in a position
10 to more readily contact people when they needed a vacancy
11 filled. What is the relevance?

12 MR. MATESIC: It all goes to this: A company like
13 Cost has -- has several objectives. Okay? And we have them
14 on the record. One of them is to make money. The other one
15 is to advance the goals of equal employment. There are
16 times when those two goals --

17 THE COURT: Sustained.

18 (End of discussion at side-bar.)

19 MR. MATESIC: Nothing further.

20 THE COURT: You're excused, sir.

21 Are all the exhibits moved that you wanted?

22 MR. MATESIC: We haven't done that yet. Actually,
23 Your Honor, your clerk asked us to prepare --

24 THE COURT: That's fine. I mean, I just want to
25 make sure that -- you needn't do it right now, but we will

1 make sure we're all on the same page.

2 And, similarly, have you kept your list of
3 exhibits?

4 MR. PAWK: I have.

5 THE COURT: All right. Have you anything further,
6 then?

7 MR. MATESIC: Plaintiff rests.

8 MR. LUTZ: Can we have a motion, Your Honor.

9 THE COURT: We're done with the case now. So the
10 next thing that would typically happen would be the
11 closing -- closing arguments and then my charge. So if you
12 go back in there. And I want to have my clerk come back
13 out. I'll be back presently.

14 (Jury recesses at 1:55 p.m.)

15 (Discussion held off the record.)

16 THE COURT: All right? Who is making the motion?

17 MR. LUTZ: I will, Your Honor.

18 Your Honor, obviously, this will be a Rule 50
19 motion for a directed verdict in accordance with the law for
20 the Plaintiff's failure to state a case under the law.

21 We have discussed this in -- we have
22 discussed the elements of these types of cases in the
23 charge, and we all know that there are certain --

24 THE COURT: Pull the mic. over to you more.

25 MR. LUTZ: -- certain items necessary to present

1 the prima facie case, and Plaintiff has the burden. The
2 Plaintiff has the burden. One of the items, obviously, is
3 to establish that there were vacancies.

4 With the record as it exists now, we believe
5 the Plaintiff has not met its burden under the law. There
6 is vague testimony about possibilities of hiring dates. When
7 you couple it with the testimony from their own witnesses,
8 particularly the Plaintiff, with respect to the changing
9 patterns on this job site day in and day out, it is -- they
10 have not met the burden of establishing that there were
11 vacancies on the job site for laborer's positions with
12 respect to that -- to the position for which Miss Brown
13 sought employment.

14 Even if they make this prima facie burden,
15 then the burden shifts for us to establish a
16 nondiscriminatory reason. And we know, from our discussion
17 in chambers, that those things sort of lump together. But
18 then they still have the burden of showing some type of
19 animus and some type of intentional discrimination on the
20 part of the Defendant.

21 Now, they have attempted -- and in their
22 brief in support of motion for -- or in response to motion
23 for summary judgment, they indicated that there was a stray
24 remark by Mr. Heaton that was some type of evidence of a
25 gender -- or a company-wide animus towards women. And

1 that's what they were going to attempt to show.

2 Obviously, they were not able to show that in
3 this case. They put on no evidence of that, because they
4 were unable to establish statistically, by a comparison to
5 the available labor pool and the people hired and then fired
6 at Cost Company, that there was any disparity. They
7 couldn't show that.

8 So now all we have, even if they make their
9 prima facie case, and even if they are able to establish
10 that there's some job availability through this testimony of
11 Mr. Barrett and the testimony -- or the testimony regarding
12 John Bell's hiring date, they need to show there's some type
13 of animus. And the only thing that is of record that is
14 even suggestive of that is these very stray remarks at a
15 deposition a year, if not two or three years after -- I
16 guess two years after the hiring or failure-to-hire decision
17 was made.

18 There is nothing else in the record that
19 suggests any type of animus on behalf of Cost Company
20 towards women. And I would submit that it's very contrary
21 to that, from the witnesses that Mr. Matesic called.

22 Very difficult case for him to make, calling
23 witnesses, hostile witnesses on cross-examination. That's
24 how he chose to make his case. No statistical evidence,
25 because we couldn't establish a proper foundation. Just a

1 wild stray remark.

2 And, Your Honor, if you look at that remark,
3 I don't think it suggests any type of racial -- or, I'm
4 sorry, sexual discrimination on behalf of Mr. Heaton. He
5 made a statement in a deposition that he thinks, generally
6 speaking, men may be able to carry heavier loads than women.
7 How that indicates that sex was a determinative factor --

8 THE COURT: Let me ask you this, just to cut to
9 the chase here: If, for the sake of argument, there is a
10 triable issue of fact on the prima facie case, and if, for
11 the sake of argument, the jury were to determine that a
12 prima facie case had been made out, then what -- then one of
13 the things that that would mean is that the jury had chosen
14 to disbelieve the Defendant's proffered reason for its
15 failure to hire.

16 Why wouldn't, for instance, that, coupled
17 with any other evidence the jury might want to consider,
18 such as the remark, be sufficient for the jury to infer that
19 the real reason was gender-motivated?

20 MR. LUTZ: Because that in and of itself doesn't
21 do it. There has to be some proof. Just the fact that we
22 did not hire a woman, we all know that that might --

23 THE COURT: That's not enough.

24 MR. LUTZ: That's not enough.

25 THE COURT: But in deciding the -- here is my

1 point: To me, it is crystal clear, notwithstanding the
2 rather unique posture of this case. You have gone to trial
3 defending on the basis that you did not apply for the
4 laborer position, and, furthermore, she applied for an
5 operator's position. And, furthermore, that even if she had
6 applied for a laborer's position, one isn't available.

7 If the jury comes back and says we disbelieve
8 implicitly, we disbelieve you; she applied -- we think she
9 did apply for a laborer's position, and, furthermore, we
10 think one was available, well, then, they have, in essence,
11 done one of the things you would do on the second Fuentes
12 test prong; is they have found that your stated reason was
13 pretextual.

14 MR. LUTZ: No.

15 THE COURT: Why not?

16 MR. LUTZ: Because under the Fuentes prong -- and
17 I realize this requires mental gymnastics because of the
18 burden-shifting thing. If the burden shifts, and they
19 have -- and we had -- and we present this evidence, it still
20 is on them to show animus.

21 THE COURT: I understand. And I'm not disagreeing
22 with you on that. But in demonstrating -- in a typical
23 Fuentes burden-shifting case, where the question of pretext
24 is up in the air, and it isn't resolved in a prima facie
25 case, and the jury then turns to a legitimate

1 nondiscriminatory reason, my standard charge on that would
2 say, the law recognizes there are generally two ways in
3 which a Plaintiff can show that Defendant's stated reason is
4 pretext. The first is by demonstrating weaknesses,
5 implausibilities, inconsistencies, incoherences, or
6 contradictions in the Defendant's stated reason. All right?
7 The second is by introducing evidence that discrimination
8 was more likely than not the motivating cause of Cost's
9 decision.

10 What I'm saying in this case, if the jury
11 concludes that she has made out a prima facie case, they
12 have already concluded, have they not, that there must have
13 been weaknesses or inconsistencies or contradictions in your
14 stated reason, and, therefore, at least that prong is
15 satisfied.

16 Now, that doesn't necessarily mean that they
17 have to then find that the mere fact that it was a wrong
18 reason was a gender-motivated reason, but they could.
19 Couldn't they?

20 MR. LUTZ: Only if there is animus. They can't
21 just assume that it's a gender-related reason. And that's
22 the point.

23 THE COURT: Well, what about -- what about the
24 uncontradicted evidence that the only person who was in a
25 position to hire her expressed the opinion, at least in

1 part, that a female would not be as capable in some respects
2 to performing the position of mason tender.

3 MR. LUTZ: Well, first, he didn't say the position
4 of mason tender.

5 THE COURT: Well, a laborer.

6 MR. LUTZ: He said lifting. Lifting. Generally
7 speaking, lifting. It's a remark made -- I forget the date
8 of the deposition. Say a year, two years --

9 THE COURT: Yes.

10 MR. LUTZ: It has nothing to do with the
11 decision-making process on July 31st or whatever the date
12 was when she showed up.

13 THE COURT: I have your point. On what other
14 basis are you moving under Rule 50?

15 MR. LUTZ: That's all, Your Honor.

16 THE COURT: Do you have anything you want to say
17 to me?

18 MR. MATESIC: Well, just that you put your finger
19 right on it.

20 THE COURT: All right. Then don't look a gift
21 horse in the mouth. It's denied.

22 MR. LUTZ: Your Honor, one other housekeeping
23 item. You never asked us on the record before the jury if
24 we had a case to present. I realize how this has gone back
25 and forth. We would like the opportunity to stand up and

1 say we have no witnesses.

2 THE COURT: I'm going to do that. But before we
3 do that -- you sit down, if you want. In my never-ending
4 attempt to fine-tune this charge -- have you had an
5 opportunity to read my most recent effort?

6 MR. MATESIC: I have not, Your Honor. I have
7 gotten partially through it.

8 THE COURT: All right. Well, then, I think it's
9 something that we should do, and make sure it's complete and
10 done. I think it is. Because I don't want to roll into
11 these closing arguments if there is something in -- if you
12 are going to be tailoring your facts to the law, I want to
13 make sure we are all on the same page.

14 So have you finished reading? You haven't
15 read it, have you?

16 MR. LUTZ: Mr. Pawk hasn't. I started to. But
17 does Your Honor include a punitive damages charge?

18 THE COURT: Yes. And I'm going to send that out.

19 MR. LUTZ: "Send that out" meaning --

20 THE COURT: I'm going to charge on punitive
21 damages.

22 MR. MATESIC: Your Honor, you also are allowing us
23 to voice an objection to the verdict slip?

24 THE COURT: Sure. Do you have a thought on that
25 right now?

1 MR. MATESIC: I do, actually.

2 MR. LUTZ: Before we jump to that, Your Honor, I
3 would like to place my objection on the record --

4 THE COURT: It is.

5 MR. LUTZ: -- with respect to the punitive damages
6 charge. I think it's --

7 THE COURT: It is. It's protected.

8 What do you want to tell me?

9 MR. MATESIC: Sure, Judge. First of all, I think
10 it would unnecessarily confuse the jury to present them
11 with -- rather than present -- let me say that a different
12 way.

13 THE COURT: Slowly, now.

14 MR. MATESIC: Right. There's two alternatives
15 here at the very least. One is to ask them the simple
16 question of was Miss Brown discriminated against. Do you
17 believe that Cost discriminated against her.

18 THE COURT: Right.

19 MR. MATESIC: The other alternative is to state
20 the legal standard of four separate elements of a prima
21 facie case --

22 THE COURT: Right.

23 MR. MATESIC: -- et cetera. The Court's points
24 for charge already instruct the jury as to the law. This is
25 duplicative. This makes the ultimate decision that the jury

1 is going to return more -- more laborious, if you will.
2 They are going to have to spend more time now reaching this
3 decision.

4 All of the instructions that they need to
5 reach their resolve are contained in the points for charge.
6 They have to go through this slip now, and they have to do
7 what I would contend is double work. And it would be --

8 THE COURT: So I'm clear, though --

9 MR. MATESIC: I'm sorry.

10 THE COURT: So I'm clear, your point isn't that
11 there is anything legally incorrect with the structure of
12 the slip, is there?

13 MR. MATESIC: It's just the tendency --

14 THE COURT: Is that right?

15 MR. MATESIC: -- to confuse the jury, given that
16 they have already been instructed on this --

17 THE COURT: What is confusing about the slip?

18 MR. MATESIC: Well, you have given them
19 instructions in the points for charge.

20 THE COURT: Yes.

21 MR. MATESIC: Okay? This slip does not verbatim
22 reproduce those instructions. This is a portion of the
23 instructions. Right?

24 THE COURT: I am using the slip. I have used -- I
25 have found a special verdict form in cases like this to be

1 uniformly helpful to a jury. I have never heard an
2 objection to greater specificity, rather than lesser, so I'm
3 going to use it.

4 MR. MATESIC: One last comment. No. 6 states, "Do
5 you find by a preponderance of the evidence --

6 (Mr. Matesic interrupted by the reporter.)

7 MR. MATESIC: I apologize.

8 THE COURT: He said, "Do you find by a
9 preponderance of the evidence that Cost Company willfully
10 discriminated against Kathleen Brown."

11 MR. MATESIC: It's the "willfully". Because the
12 legal standard is the intentionality or reckless
13 indifference. The absence of reckless indifference --

14 THE COURT: You don't have to go any farther.
15 I'll change it. It will be defined by a preponderance of
16 the evidence that Defendant Cost Company willfully or
17 recklessly discriminated against Kathleen Brown.

18 MR. MATESIC: My -- I would just like to say my
19 preference would be to use the word "indifference", as
20 stated by the Third Circuit. And I would object to the slip
21 to the extent that that word or that term is not included in
22 the slip.

23 THE COURT: Well, I'm not sure what the difference
24 between reckless or reckless indifference is, but --

25 MR. MATESIC: For the purposes of my closing

1 argument, I will be saying reckless indifference.

2 THE COURT: Well, you can say reckless
3 indifference, and then we will be saying the same thing. So
4 as soon as you're done reading -- finishing this charge -- I
5 want you to concentrate on the prima facie point. That's
6 where we changed it. Then let my clerk know. I want to
7 come out, and I want to get her revising it, if I have to,
8 and I want to go on to closing arguments.

9 MR. LUTZ: Your Honor, we were not asked about the
10 verdict slip.

11 THE COURT: Oh. Did you have something on the
12 verdict slip? I'm sorry.

13 MR. LUTZ: Yes, Your Honor.

14 (Discussion held off the record.)

15 MR. LUTZ: The No. 4 in the verdict slip says, "Do
16 you find that Kathleen Brown has proven by a preponderance
17 of the evidence that sex was a determinative factor in Cost
18 Company's failure to hire her as a laborer."

19 THE COURT: Right.

20 MR. LUTZ: I think the Court has to inject the
21 element of intentional discrimination, and what I would
22 propose would be to read it this way: Do you find that
23 Plaintiff Kathleen Brown has proven by a preponderance of
24 the evidence that Cost Company intentionally discriminated
25 against Kathleen Brown by using her sex as the determinative

1 factor in failure to hire her as a laborer.

2 THE COURT: So it's intentional discrimination, as
3 opposed to -- I think that's accurate.

4 MR. LUTZ: Correct.

5 THE COURT: I think it would have been implicit,
6 but I'll change it that way. All right. I'll --

7 MR. MATESIC: I would lodge an objection, because
8 now we have two different standards here; talking about
9 intentionality in one, reckless indifference in the other.
10 We are highlighting that, intentionality in Paragraph 4. We
11 are not using the word indifference in No. 6. I believe
12 it's going to confuse the jury. And "intentionally
13 determinative" is redundant. Determinative states a legal
14 standard.

15 THE COURT: Let me see the jury slip there. Which
16 one are you talking about?

17 MR. LUTZ: I'm talking about No. 4. And I think
18 he's confusing No. 4 with the punitive damages question at
19 No. 10. No. 4 is a correct statement of the law with
20 respect to case in chief --

21 THE COURT: You know, I already charged -- when I
22 say sex was a determinative factor, I already charge the
23 jury that the discrimination has to be intentional.

24 MR. LUTZ: Right. I think the slip should be
25 consistent with the charge, by saying they have to find it

1 was intentional.

2 MR. MATESIC: Where is the section of the charge?

3 Pardon me.

4 MR. LUTZ: It's at --

5 THE COURT: It's at Page 10.

6 MR. LUTZ: -- Page 10.

7 THE COURT: "It is not enough for you, the jury,
8 to disbelieve the reasons stated by Cost. You must also
9 believe Brown's claim that the decision was the result of
10 intentional discrimination."

11 MR. MATESIC: That's --

12 MR. LUTZ: And all I'm asking is to make the slip
13 consistent with the charge.

14 MR. MATESIC: I'm sorry, Your Honor; I'm having
15 trouble with --

16 THE COURT: All right. Well, this is what I'm
17 going to say for 4, because it's an accurate statement of
18 law. If you find that the Plaintiff Kathleen Brown has
19 proven by a preponderance of the evidence that the
20 Defendant -- that Cost Company intentionally discriminated
21 against her in failing to hire her as a laborer and that sex
22 was a determinative factor in Cost's decision. All right.

23 (Recess held from 2:13 p.m. till 2:26 p.m.)

24 (Whereupon the following discussion took place on
25 the record in camera:)

1 THE COURT: Let's return yet again. Do you have
2 objections to the charge?

3 MR. PAWK: We don't, Judge.

4 THE COURT: How can we improve this charge, then?

5 MR. MATESIC: I guess I'll limit it to one comment
6 then. Page 9, second full paragraph. I believe that this
7 paragraph is far too restrictive, given the evidence of
8 record.

9 THE COURT: Which one? "Brown cannot prove"?

10 MR. MATESIC: That she has to prove that on the
11 date that she applied, there was one or more -- on the day
12 that she applied, there was a labor position which was open
13 and that position remained open and Cost continued to seek
14 applications from persons of her qualifications.

15 THE COURT: That, by the way, is precisely the
16 prong of the prima facie case that you wanted me to include.

17 MR. MATESIC: Right. Well, then, let me say this:
18 Upon further consideration, what the facts have shown as of
19 right now is that there were laborer positions -- I'll
20 restate that. Brown had -- according to Brown's testimony,
21 she had delivered a piece of paper with her name and contact
22 information on it, and after the date that she did that, a
23 position arose, which Cost filled. And our position is that
24 the facts in evidence show that -- the facts in evidence
25 show that she was discriminated against not only on

1 July 31st, but also on August 14th and also on August 18th.

2 And so I would suggest that the charge be
3 revised to read -- and I'm only revising the first three
4 lines here. Well, my revision is restricted to the first
5 three lines. If you find that Brown applied for a laborer's
6 position on July 31st, 2002, that one or more laborer
7 positions were open when she applied, and that one or more
8 laborer positions remained open, and Cost continued to seek
9 applications from persons of her qualifications.

10 THE COURT: Isn't that what I have?

11 MR. MATESIC: Not one or more.

12 THE COURT: Well, that -- a laborer position --
13 all you need is one, don't you?

14 MR. MATESIC: What this suggests to the jury is
15 luck of the draw. She has to show up at exactly the right
16 moment in time and be denied at one precise moment.

17 THE COURT: All right. Then I'll say that one or
18 more labor positions were open, because I don't really see
19 what the difference is. With that correction, are you
20 satisfied with the charge?

21 MR. MATESIC: Yeah.

22 THE COURT: What I'm going to say is if you found
23 that Brown applied for a labor position on July 31st, 2002,
24 and that one or more laborer's positions were open when she
25 applied, and that one or more laborer's positions remained

1 open, and Cost continued to -- that's what I'll put in.

2 MR. MATESIC: Right there.

3 THE COURT: Then we're good. I'll make that
4 change on there. Then we're ready to go. And the Defendant
5 goes first, in case there's any confusion.

6 (Whereupon the proceedings resumed in open court
7 with the jury present at 2:42 p.m.)

8 THE COURT: Mr. Pawk.

9 MR. PAWK: Thank you, your Honor.

10 With respect to the Defendant's case, we are
11 calling no witnesses in our case. But I would move at this
12 time for admission of all of our exhibits. I think I have
13 previously moved for Defendant Exhibits A, C, D, E, F, O, R,
14 B. But I would also move at this time for CC, AA, and U.

15 THE COURT: Any objection to any of those
16 exhibits?

17 MR. MATESIC: No objection, Your Honor.

18 THE COURT: They are admitted. Just so I'm clear
19 again, are we all admitted up, or do we have to do that
20 housekeeping later?

21 MR. MATESIC: Actually, your clerk Becky asked me
22 to provide her with a list of all the exhibits, and I did --

23 THE COURT: I'll do that on the record after
24 closings. Are you ready to go?

25 MR. PAWK: I am.

1 THE COURT: All right.

2 MR. PAWK: May it please the Court, counsel,
3 members of the jury.

4 I get to address you first in my closing,
5 because the Plaintiff has the burden of proof. She has the
6 burden of proving the elements of this case and the elements
7 of discrimination. So counsel for Kathleen Brown will get
8 to go last. So this is my last opportunity to speak to you.
9 And on behalf of my partner, Larry Lutz, I want to thank you
10 for your service in this case.

11 When you first came here on Monday, and you
12 were sitting for jury selection, and you heard that this
13 case was about gender discrimination or sex discrimination,
14 I'm sure each of you formed some expectations in your mind.
15 It's natural. Anybody would. Did you hear anything close
16 to what you expected to hear in this case? Did you hear any
17 evidence at all that Kathleen Brown was discriminated
18 against by Cost Company? I submit to you that you didn't.

19 There is no evidence of sex discrimination in
20 this case, ladies and gentlemen. And I'm going to go
21 through the evidence that has been presented to you and help
22 explain why.

23 First of all, as the Plaintiff -- as I
24 stated, Kathleen Brown has the burden of proof in this case,
25 and she has a couple huge hurdles to get over before you can

1 find in favor of Kathleen Brown and against Cost Company.
2 And the Judge will instruct you on the law at the end of the
3 case, and I'm not attempting to do that. But this is my
4 time for argument, and I do want to inform you of a couple
5 hurdles she has.

6 The first one is, she has to present what's
7 called a prima facie case; fancy words for a bear-bones
8 case. Certain elements. One of those elements is that
9 there was a job available; an available job. I submit to
10 you that she has not proven and met her burden that there
11 was an available job. If she doesn't get over that
12 hurdle -- and I submit to you that she hasn't -- you don't
13 need to go any further in this case.

14 The Judge will read you and give you the law.
15 The Judge will read you the jury charge. And he will tell
16 you that if you find that she did not apply for a laborer's
17 position -- and that's our contention, as you know; that she
18 applied for an operator's position -- and that that
19 laborer's position was open -- in other words, if you -- if
20 she failed to prove that she applied for a laborer's
21 position and that that laborer's position was open when she
22 applied and remained open, then you must find for Cost,
23 because she's failed to meet her first hurdle.

24 You will be given special interrogatories
25 when you leave the courtroom at the end of the case. And

1 this is how you arrive at your verdict. The very first one
2 is, "Do you find that Plaintiff Kathleen Brown has proven by
3 a preponderance of the evidence that she applied for a labor
4 position on July 31, 2002?" There is a box for yes, there's
5 a box for no. It goes on. It says -- I'll skip the first
6 part. But it says, "If you have answered no to Question 1,
7 please do not answer Questions, 2, 3, 4, 5, and 6. Please
8 sign and date the form, notify the courtroom staff, you have
9 completed your deliberations." And I submit to you that
10 that is what you should find in this case.

11 Second question. "If you do find --" it goes
12 on. It says, "If you find yes," okay, that she did show
13 that she applied for a laborer's position, the second
14 question is, "Do you find that she has proven by a
15 preponderance of the evidence that a laborer position was
16 available at Cost Company?" So even if you believe that she
17 said I want to be a laborer, you have to be satisfied that
18 she's proven that there was a position available on
19 July 31st, 2002. And I submit to you that she has not met
20 that burden. And if you answer no to that question -- you
21 will read the document, but it instructs you to return back
22 to the courtroom.

23 And then, finally, if you believe she gets
24 over those two hurdles, the document instructs you that even
25 if you believe she has proven those two elements, then you

1 next still have to determine -- this is the second hurdle I
2 was talking about earlier. You still have to find that Cost
3 intentionally discriminated against her because of her sex.

4 In other words, Kathleen Brown has to prove
5 she applied for a laborer's job, the laborer's job was open
6 when she applied, and if you're satisfied with that, then
7 the third thing is you have to decide if she's proven that
8 Cost didn't hire her -- intentionally didn't hire her
9 because of her sex. And there is no evidence, ladies and
10 gentlemen, in this case that Cost failed to hire her because
11 of her sex, her gender.

12 Let's talk about the evidence that was
13 presented by Kathleen Brown in this case. And I submit to
14 you that this will help you arrive at the decision in this
15 case. She called, herself; she called Rob Barrett from the
16 laborers' union; she called Dean Taylor, Cost witness, Cost
17 employee; she called Georgia Pawk, Cost witness, Cost
18 employee; she called William Heaton, again, a Cost employee.
19 What evidence from those witnesses did she present to you
20 that a job was available as a laborer on July 31st, 2002,
21 and that she applied for a laborer's job on July 31st, 2002,
22 and that that job then remained open?

23 I submit to you that she didn't elicit that
24 testimony from Ron Barrett, nor Dean Taylor, nor Georgia
25 Pawk, nor William Heaton.

1 Kathleen Brown, even in her testimony, said
2 she had no independent knowledge that Cost needed a mason
3 tender on July 31st, 2002. She admitted that. I don't know
4 if you remember when we were in the first courtroom in this
5 case. I was asking her that question, do you have any
6 independent knowledge, do you know that Cost needed a
7 laborer on July 31st, 2002, and she said no, I don't.

8 So I submit to you, ladies and gentlemen, her
9 entire case is premised on two things: That on July 31,
10 2002, she applied for a laborer's job or mason tender job,
11 and, second, that there was a laborer's job available on
12 that date. And she hasn't proven either.

13 Let me first talk about whether there was --
14 whether she applied for a laborer's job on July 31st, 2002.
15 Remember, when she was testifying, she took the stand, and
16 she said -- and this is out of her mouth -- when she saw
17 Dean Taylor on July 31, 2002, the first thing out of her
18 mouth, even on the witness stand, wasn't I'm a laborer, hey,
19 I have labored before, I have been a mason tender. No, no,
20 no. The first thing that she said on the witness stand that
21 she said to Dean Taylor, when she went to the job trailer,
22 was, I have got an operating background, I have operated.
23 That's what she told him. And he said, if you recall when
24 he testified, we didn't have any operating positions
25 available. We're not hiring.

1 Her training was in operating engineering.
2 She had no prior training in mason tendering. Her
3 background was an operating engineer. Remember, she
4 testified that she made a life-changing decision, I think in
5 the late 80's, that she was going to enter this field of
6 operating engineers, became certified, went through the
7 apprentice program? Remember all that? And then she worked
8 as an operating engineer for years. There was a little
9 lapse in her service with the union. But that that's what
10 she enjoys. She enjoys being outside. She told Dean Taylor
11 about her operating experience and her job. When she spoke
12 to Georgia Pawk in the fall of 2002, she talked to her about
13 operating experience, operating training.

14 And think of this: If she wanted a laborer's
15 job when she's talking to Georgia Pawk in July of 2002, why
16 on earth is she going through the process of being certified
17 by the operating engineer's union during that whole fall?
18 Do you remember that testimony? She went through that to
19 get recertified. Because Georgia said, I can't hire you as
20 an operating engineer; I can't, you know, legally put you on
21 the job until you are with the union. So she goes through
22 that process of being recertified. She's not telling Cost
23 she wants to be a laborer.

24 So she then -- she tells Georgia she wants to
25 be an operating engineer. She fills out the EEO form, if

1 you remember. She sends that to Cost. Remember also, she
2 testified, she admitted, Cost could not have hired her. Not
3 only did Georgia tell her that, she admitted she knew Cost
4 could not have hired her as an operating engineer until she
5 became certified at the union. And what did she do? She
6 gets certified in the union. She calls Cost on November 6th
7 and says, I'm certified. Remember? Now I'm ready. I'm
8 ready, I'm good with Local 66. Ready to be hired.

9 She takes a job on November 18 with KGL.
10 Remember that company out of Philadelphia where she went.
11 And it was a non-union job. She got paid \$15 an hour, plus
12 \$25 per diem. And what was interesting about her testimony,
13 I thought anyway, was at no time from November 6th, when she
14 said she desperately wants a job with Cost Company and she
15 notified them she's good with the union, and she gets this
16 job offer from KGL, does she call Cost back and say, hey, by
17 the way, I got a job offer with KGL, but I really want to
18 work with you guys, you know, because you're a good company,
19 and, you know, we have been talking, having all this
20 dialogue in the fall of 2002; you know, do you have anything
21 available or anything coming up soon that I could work at,
22 any jobs or anything, and maybe I'll forego that job. She
23 doesn't. She doesn't do that. That is not her testimony.
24 She takes the job in Philadelphia.

25 And then what is the next thing she does?

1 She files an EEOC complaint against Cost Company in December
2 of 2002. Says Cost discriminated against me.

3 She admitted that construction work is very
4 seasonal in Western Pennsylvania. Cost most likely doesn't
5 do much work. They are a masonry contractor. She said
6 that; November, December, January, February. It's very
7 slow. There's not jobs available. She really didn't expect
8 to be hired by Cost Company during that time. In fact, her
9 testimony was that if she got hired by Cost Company before
10 that time period, she would have been laid off during those
11 months. And she knows that.

12 So what happens? She files that EEOC
13 complaint. Remember? Then Cost, for the first time when
14 they get those documents, realizes that she now says,
15 because she put it in documents, that she wanted a laborer's
16 position. All the dialogue and all the communication they
17 had was operating engineers, operating engineers. She now
18 says for the first time in this document to them that she
19 wants a laborer's job.

20 If you recall looking at her diary, when I
21 had her -- I showed her some diary entries in March of 2003.
22 There were discussions about job sites Cost had that were
23 gearing up for spring. We have got one in Mercer, we have
24 got one in -- trying to find jobs close to her home.
25 Remember, she actually drove one day and mapped it out

1 mileagewise so she could know how far she would have to
2 travel. There were ongoing discussions about jobs in the
3 spring of 2003.

4 Then what happened? On April 7, 2003, she --
5 this is her handwriting, this is her diary. Cost offers a
6 laborer's job, remember, because we now know she wants a
7 laborer's job. She writes, April 7th, 2003, "Nothing in
8 mail from Cost. Faxed me --" and this is her words "-- shit
9 laborer job. (Not)" Well, the truth is starting to come out
10 now. Okay?

11 What happens the next day? Again, her diary.
12 She testified that she put events that happened in her life
13 on a daily basis in her diary. Remember? Next day, April
14 8th, "Called John. No go with Cost, no labor. Operator."
15 The truth is revealed. She always wanted an operator's job.
16 She's made this whole story up about wanting to become a
17 laborer because it's the only way she can win this case.
18 It's the only way. She knows that they couldn't hire her as
19 an operator. That's what she came on the site and asked
20 for. But they couldn't legally hire her, because they
21 didn't have any jobs available. But we now know, through
22 all her actions and course of conduct, she always wanted an
23 operator's job. If she wanted to get in with Cost and this
24 great company and be a laborer and true mason tender, she
25 had the opportunity. She rejects it.

1 Now, she testified that the reason she
2 rejected them was -- again, her words -- they kicked me
3 around. Curious, though. No mention of any mistreatment by
4 Cost Company in her diary during the whole fall of 2002 and
5 after she files the EEOC complaint about Cost not treating
6 her properly, Cost discriminating against her. No mention
7 of that anywhere. Of course, this is her diary where she's
8 writing her most personal details and her feelings every
9 day.

10 Remember, I said at the beginning, opening
11 statement, a trial is a search for the truth. We found the
12 truth in her own handwriting in the spring of 2003. She
13 wanted an operator's job. There was none available. She
14 couldn't have been hired, because she wasn't in the union.

15 And also, remember, she testified, because I
16 showed her a deposition -- still trying to maintain and
17 contend here at trial that she wanted that laborer's job, so
18 I showed her her deposition where she said, well, I went up
19 there, wanting to operate a lull, because I heard the
20 laborers were operating the lulls. She wanted to operate
21 equipment. That's what she wanted to do.

22 But you heard testimony from Dean Taylor,
23 operating engineers were operating the forklifts and lulls
24 and cranes, not laborers. She was misinformed. But that's
25 what she went up there to try and find. She didn't want to

1 be a mason tender. And the proof is in her own handwriting.

2 She told you she knew the process of union
3 hiring. By union contractors, she was aware of the process.
4 If you want a laborer's job, you join the laborers' union,
5 because you get called out of the union. If you want an
6 operator's job, you join the operator's union. Oh, yeah, by
7 the way, what union did she join? Operators' union.

8 What jobs has she been working since April of
9 2003 to today? Asked her on the witness stand on Tuesday.
10 She rattled off three or four jobs. Trumbell Corporation,
11 heavy highway. She was running a truck. A & L Corporation.
12 They make -- they build bridges. Operator's job. She works
13 for Mashuta (phonetic) Corporation today. Heavy highway.
14 Operator's job. That's what she does, that's what she has
15 always done, that's what she wanted to do, that's what she
16 wanted to do when she stepped on Cost's job site on July 31,
17 2002.

18 Well, the other thing I said she has to prove
19 is whether there was a laborer's job even available on
20 July 31, 2002. She told you she knew the labor needs
21 changed on a daily basis on a construction site. One day
22 you might need a laborer, the next day that laborer might
23 not show up. All of a sudden they need someone. No
24 warning. Cost might hire someone right off the street that
25 day. These are not the type of jobs that remain open and

1 available and they publish a listing and people send in
2 applications. It changes on a daily basis. Daily. Not
3 weekly, daily.

4 What proof did she provide, if any, that
5 there was a job available the day she walked up there on
6 site. I mean, Dean Taylor testified that people came on the
7 site every day looking for jobs. Sometimes we had openings,
8 sometimes we didn't.

9 As an aside, her contention in this case is
10 that she was discriminated against by Cost Company on
11 July 31, 2002. If she really believed that, that day, why
12 did she go back on August 23, 2002? If you felt you have
13 been mistreated and discriminated by Dean Taylor on July 31,
14 2002, why would you bother to go back? She wasn't
15 discriminated against. She never felt they discriminated
16 against her.

17 But she does come back on August 23, 2002.
18 And we know, though, there were no new hires by Cost Company
19 after August 19, 2002, so there's no job available on
20 August 23, 2002.

21 But getting back to the July 31, 2002, let's
22 look at the evidence with respect to whether there was a
23 laborer's job available that day and what proof she has
24 presented.

25 They call Ron Barrett, the business agent

1 from the laborers' union, and they had him show a
2 document -- or they put a document in front of him that
3 showed Cost Company initiations, meaning people that Cost
4 hired off the street during that project who then join the
5 union. He testified that the start date on his document,
6 the start date, doesn't necessarily mean that's the date the
7 person started at Cost Company. It's the date his
8 business -- his steward that was on the project representing
9 the union went over to that person and had them sign up. An
10 authorization slip. Remember that?

11 And I showed them the authorization slip for
12 John Bell, who they contend -- Kathleen Brown contends --
13 was hired on August 1st. Okay? And I showed them John
14 Bell's. But there is no date on John Bell's authorization
15 slip. It's not dated. Wouldn't that have been -- wouldn't
16 that have helped you, knowing that the steward went over and
17 signed him up?

18 In any event, Kathleen Brown will argue to
19 you that Ron Barrett gave some general testimony that, well,
20 whenever we ran out of mason tenders to supply to Cost, they
21 would call us regularly. That was the normal process. They
22 would call, hey, we need mason tenders, I'd send them. If
23 we didn't have any in his local union, he would call other
24 laborers' unions and get them for him, and when they
25 exhausted all of those, only then would Cost then hire off

1 the street. Remember, that was the process. And this job,
2 I think all the Cost witnesses testified, was very unique.
3 They don't do this. They don't hire off the street. The
4 normal process is, because they have a labor agreement, is
5 you have to hire from the union, and you have to take who
6 they send you. But he said, well, the start date I would
7 have in that document might be a day or two after Cost
8 called me saying that they needed somebody.

9 Is that -- is that sufficient proof, ladies
10 and gentlemen, that there was a job available on July 31st,
11 2002? Proof that there was a vacancy when she stepped on
12 the site that day? I'm sorry, ladies and gentlemen, but
13 that's not sufficient.

14 Dean Taylor was shown Cost certified payroll
15 records, and he said that the first date that John Bell
16 showed up on Cost payroll records was August 6th, 2002. And
17 remember, today, William Heaton testified he was familiar
18 with the hiring process on that job, and he said John Bell
19 could have been hired or anybody could have been hired the
20 same day that their name appears on that initiation sheet.
21 It doesn't mean that they were -- they started working two
22 or three days before, and then they appeared on that
23 initiation sheet later. He said we could hire them that
24 day. I mean, somebody didn't show up for work, call the
25 union, don't have anybody, have people standing outside the

1 trailer, come on in, we'll sign you up.

2 Again, it's their burden to show you
3 sufficient evidence that there was a job opening for a
4 laborer position on July 31, 2002. It is very far from
5 clear that there was any job available for a laborer on
6 July 31 of 2002.

7 Just for a moment here, I'd like to ask you
8 to look at this case from Cost Company's perspective. You
9 have been hearing -- all the evidence so far is from
10 Kathleen Brown's perspective, and the evidence that's been
11 presented has all been presented by Kathleen Brown.

12 Large project. You saw the photograph. Very
13 large. 25 buildings. Had to be built in a year. One year
14 to complete. Cost gets bricklayers, operating engineers,
15 laborers, all from the union. They are a union contractor.
16 They have a union agreement with all of those unions. And,
17 again, as I stated earlier, if the unions aren't able to
18 supply them, you know, on that -- on a few occasions they
19 hire mason tenders off the street. Not normal, though.
20 July 31st, 2002 wasn't one of those days where they ran out
21 of people.

22 Dean Taylor was busy running a large project.
23 As he testified, people showed up all the time. He didn't
24 keep records. There was no obligation to keep records.
25 Kathleen Brown would have you believe that there was some

1 obligation that they have to keep all these records. He's
2 busy. He's working. She even testified, he would -- she
3 showed up at the trailer at 6:30. He was already out of the
4 trailer and out on the job site. He was supervising all the
5 other foremen. He didn't have time to keep records of
6 everybody that showed up at the site. If he did, he would
7 never get the job built.

8 Bill Heaton -- this is interesting --
9 today -- Bill Heaton, she testified under oath that she
10 talked to Bill Heaton on August 23, 2002. Remember that?
11 She went on the site, and she called him. Well, I was told
12 to look for him, because he's as round as he is tall. It's
13 an interesting comment by someone who believes they have
14 been discriminated against.

15 But Bill Heaton, he has no reason to tell
16 you -- to come into court and say I never met this woman,
17 which he did. There is no reason to lie or fabricate that.
18 Because as we know, Cost didn't hire any mason tenders off
19 the street after August 19, so there were no jobs available.
20 So why would he even lie, if that's what they contend, that
21 he didn't meet her on August 23? But he didn't.

22 Georgia Pawk receives an EEO memorandum. She
23 writes on it -- and you saw the document -- "Love to hire
24 you. Need your phone number to contact you." She wanted to
25 hire her. Love to hire you, love to have you, need your

1 phone number to contact you. Wrote a memorandum to her
2 foreman and project managers. Remember that? On the same
3 date she gets the memo. She doesn't throw it under her
4 desk. She writes a memo; hey, a Kathleen Brown, I got a
5 memo, an EEO memo from Kathleen Brown; she appeared on the
6 site apparently, filled out an EEO form; if she comes back
7 to the site, I would like to hire her, because she was
8 impressed with her operating engineer resume. Remember
9 that?

10 Georgia Pawk talked to her on the phone on
11 October 29, 2002. Told her, I would love to hire you, but I
12 can't until you are certified. Remember that? Is this --
13 is this indicative of a company that doesn't want to hire
14 this woman, that's trying to discriminate against her?

15 The Marienville job was winding down at that
16 point. Georgia Pawk, she called Dean Taylor, and he told
17 her, I don't have anything. I mean, no operators for sure.
18 Job is winding down. Couldn't put her back on Marienville.
19 She wasn't eligible to even be hired as an operating
20 engineer until November 6th, 2002. And what does Georgia
21 Pawk do at that point in time? Just blow her off? She
22 talks to her about hiring her at a job in Erie. Remember
23 that testimony? She talked to -- Jack Cramer was the guy's
24 name, and she talked to Kathleen about hiring Kathleen at
25 the job in Erie. Not the Marienville job, another Cost job.

1 Sound like a company that was trying to discriminate against
2 her or didn't want to hire her because she was a woman?

3 As we know, Kathleen Brown took a job with
4 KGL on November 18th, 2002. Kathleen Brown never called
5 Georgia Pawk back, as I said earlier, hey, I got this other
6 job offer; you know, can you still work something out with
7 me on the Erie job. No, no. She takes another job. She's
8 not worried about being discriminated against by Cost
9 Company. Instead, she files an EEOC claim in December of
10 2002 claiming that Cost discriminated against her.

11 And we looked at that charge document, if you
12 recall, when she was on the witness stand; charge of
13 discrimination. Remember this document (indicating)? And,
14 ladies and gentlemen, I submit to you, this is the smoking
15 gun document in this case.

16 She testified Tuesday that this -- she
17 provided the information that went into this document.
18 Remember that? And that she said -- and I pointed down here
19 (indicating). That's her signature. It's dated 12/30/2002.
20 And, "I declare under penalty of perjury that the foregoing
21 is true and correct." Remember that? She understood what
22 perjury meant. She said that too.

23 But then I went and asked her about some
24 things that she put in the document. Remember? Up here
25 (indicating). I asked her, date of discrimination,

1 earliest, 7/1/2002. She admitted she never went on the job
2 site until 7/31/2002. She admitted under oath Tuesday that
3 that's wrong. She knew it was wrong.

4 Then I showed her over here (indicating), you
5 say that Cost discriminated against you based on sex and
6 disability. She admitted under oath Tuesday that that's
7 wrong; they didn't discriminate against her her based on
8 disability.

9 And I showed her down here (indicating) with
10 respect to disability. She wrote, "I believe that the
11 Respondent discriminated against me because of my medical
12 condition and/or disability." She testified Tuesday she
13 never told Dean Taylor, she never told William Heaton, she
14 never told Georgia Pawk she suffered from any kind of
15 disability. Yet when she wanted to prepare a document
16 charging discrimination against Cost under penalty of
17 perjury, she said they did. That they discriminated against
18 her based on her disability.

19 Ladies and gentlemen, you're going to hear
20 the jury charge from Judge McLaughlin, and one of the things
21 he's going to tell you is, in that jury charge, is -- and
22 it's, again, in Latin, and I'm not trying to be legalese
23 with you -- Falsus in uno, falsus in omnibus, which in Latin
24 means, false in one, false in all. And he's going to tell
25 you, I charge you that if you find that a witness has lied

1 to you in any material portion of his or her testimony, you
2 may disregard that witness' testimony in it is entirety.
3 That's the law. Again, the Judge will give you the law, but
4 that's what is going to be read to you in the charge.

5 What is Kathleen Brown's motive here? I
6 submit to you that when that charge of discrimination was
7 put up in front of her and she talked about it, her
8 attorney, Mr. Matesic got up and asked her, well, you're not
9 familiar with what Title VII in a Civil Rights Act is, are
10 you? You don't know what that means. You didn't put
11 that -- you didn't type this up.

12 Well, then, remember, I got up, had another
13 opportunity to ask her questions, and I said, well you just
14 said you weren't familiar with Title VII of the Civil Rights
15 Act charging discrimination, right? But, yet, you filed two
16 prior EEOC complaints, didn't you? Yes, I did. Under Title
17 VII of the Civil Rights Act. Yes. She admitted she filed
18 an EEOC complaint; a charge of discrimination against her
19 own operating engineer's union. Remember that? Saying that
20 she gave a positive drug test. Then she admitted she filed
21 an EEOC charge against Solar Testing Labs, another company
22 that she worked for on this same project, because they made
23 her take a test. Remember that? A written test. She
24 didn't score well on it, but she didn't get to take it a
25 second time, so they discriminated against her, based on her

1 testimony, and she sued them for discrimination.

2 Well, she's familiar with what Title VII is.
3 She's familiar with what a Title VII, a Civil Rights Act is.
4 Yes, she is. And contrary to her testimony, she's very
5 familiar with it. She has filed now three EEOC complaints,
6 that I'm aware of.

7 I submit to you, ladies and gentlemen, she's
8 abused the Civil Rights Act. She's abused it. That statute
9 was designed to help people who truly have been victims of
10 discrimination.

11 This case isn't about someone who wants to
12 wear a hardhat. That's not what this case is about. This
13 case is about someone who wants something for nothing. It's
14 a shakedown.

15 Getting back to Cost Company's perspective in
16 this, again, I reminded you that after she filed that charge
17 of discrimination, they then had dialogue with her about
18 hiring her. They still didn't harbor any ill will. Come
19 on, we'll hire you. They were talking to her about jobs,
20 but she rejected them. What more could Cost Company have
21 done? Look at it from their eyes. What else could they
22 have done?

23 Ladies and gentlemen, I submit to you that
24 after I sit down here, Mr. Matesic will come before you, and
25 he'll tell you that you should find for his client. And

1 then he's going to go over to that easel there, and he's
2 going to flip the pages down, and he's going to ask you to
3 award his client money damages. And when he does that, I
4 want you to look him in the eye and think to yourself, for
5 what? For what? On this proof? The proof you presented
6 here that this -- the evidence you presented in this case?
7 No way. Ladies and gentlemen, they haven't come close to
8 meeting any of the hurdles that she has in this case.

9 Finally, your verdict must be unanimous. The
10 Judge will instruct you on that as well. Your verdict must
11 be unanimous. In order for you to find for Kathleen Brown,
12 all seven of you must find that she has met all the elements
13 of her proof that the Judge will give you.

14 I submit to you that you will not be able to
15 do that; that you should not condone Kathleen Brown's
16 behavior in this case by awarding her anything. You should
17 reject it. Your verdict should be unanimous in favor of
18 Cost Company and against Kathleen Brown.

19 And in closing, I'd like to tell you that I'm
20 proud to represent Cost Company. My partner is proud as
21 well. It's a good company. And you heard their witnesses
22 take that stand and say they have EEO policies, they don't
23 discriminate. They hire anybody. They will take anybody.
24 And maybe Georgia got a little animated because it's
25 personal to her. She doesn't discriminate. They hire

1 people of all walks of life. You heard that. They have
2 had -- she has an EEO file on it. She tries to hire people
3 that are disadvantaged, people of minority.

4 Ladies and gentlemen, thank you for your time
5 in this case.

6 MR. MATESIC: May we approach, Your Honor.

7 (Whereupon the following discussion was held on
8 the record at side-bar:)

9 MR. MATESIC: I would want to put the motion on
10 the record for a mistrial. Counsel for the Defendant has
11 made highly prejudicial statements repeatedly in his closing
12 argument. He referenced --

13 THE COURT: I'm having a little trouble hearing
14 you.

15 MR. MATESIC: He has made highly prejudicial
16 statements repeatedly during his closing argument. He
17 referenced three civil rights action cases -- excuse me, he
18 referenced three civil rights cases that Ms. Brown has filed
19 as evidence of her lack of credibility. He was warned
20 repeatedly by the Court as to the irrelevance of that
21 evidence.

22 He also attempted to prejudice the jury
23 against Miss Brown's counsel. I believe I quoted him
24 correctly. I'm now going to read into the record. "I want
25 you to look Ms. Brown's attorney in the eye when he asks you

1 for damages and ask him, for what." He is trying to suggest
2 that Ms. Brown's attorney is motivated by concerns other
3 than the objective of justice.

4 He also personally vouched for his client.
5 He said he was proud to represent Cost Company. An attorney
6 may not vouch for the client.

7 MR. PAWK: Do you want me to respond, Judge?

8 THE COURT: Well, yeah.

9 MR. PAWK: The issue of the three EEOC complaints
10 is clearly in evidence, because counsel opened the door to
11 that. Because you initially ruled I couldn't get into that.
12 So that's clear.

13 The second comment that I asked them to
14 look -- I asked them to look at him, for what, I thinks it's
15 all fair argument. I don't think there's anything improper
16 with that. And I can say I'm proud to represent my client.

17 THE COURT: To me, this is just good old-fashioned
18 closing argument. As far as the specific objection about
19 the reference to the previous charges, that door was opened
20 in -- by virtue of -- by virtue of a series of questions
21 asking her whether she had any experience in Title VII. So
22 the mistrial is denied.

23 MR. MATESIC: Your Honor, if I may.

24 THE COURT: You may.

25 MR. MATESIC: One more thing. I am going to ask

1 for an instruction that I understand the Court is not going
2 to do. I had asked your clerk for a final copy of the
3 points for charge so I could place it on the record in
4 camera, and --

5 THE COURT: Do you mean the final copy of my
6 charge to the jury?

7 MR. MATESIC: Right.

8 THE COURT: I have a copy here. Do you want to
9 use it?

10 MR. MATESIC: Sure.

11 THE COURT: Let me make sure this is the right
12 one. Yes. You just have to give it back to me after the
13 break.

14 (Discussion held off the record.)

15 THE COURT: This is the final. Okay, what I am
16 going to do is this: You have got about a half an hour,
17 right? Maybe?

18 MR. MATESIC: Maybe.

19 THE COURT: I think, you know, my charge takes
20 about 30 minutes, 35 minutes. And I would take a break
21 anyways after this. I probably am going to send this jury
22 home and charge them tomorrow morning, rather than start
23 this at 4:30 this afternoon. I don't keep juries much
24 beyond a quarter to 5:00 anyways. We'll see how it goes.

25 MR. PAWK: Could I suggest this, Judge: Could you

1 inquire of the jury what they might want to do?

2 THE COURT: Well, they might want to, but they are
3 not going to stay beyond that time anyways. That's just the
4 way it is. This had the possibility of running into Friday.
5 And that's just the way, unfortunately, it's shaking out.

6 (End of discussion at side-bar.)

7 (Discussion held off the record.)

8 (Whereupon the following discussion occurred on
9 the record at side-bar:)

10 MR. MATESIC: The portion of the charge regarding
11 the pretext, specifically the language, "If you disbelieve
12 the employer's reasons, you may or may not be required to
13 find discrimination."

14 THE COURT: Yeah.

15 MR. MATESIC: -- I am having difficulty finding
16 that in here. Do you?

17 THE COURT: Now, what is it you want me --

18 MR. MATESIC: After the burden shifts to the
19 Defendant, the Defendant articulates the reason it goes back
20 to the Plaintiff. And, again, we get into the discussion of
21 pretext.

22 There is specific language from the Third
23 Circuit regarding the analysis that the jury is to partake
24 in, in determining pretext, and what the effect of a finding
25 of pretext --

1 THE COURT: I know what you're talking about.

2 Okay.

3 (End of discussion at side-bar:)

4 THE COURT: Members of the jury, we're going back
5 into chambers for a second. Let me see counsel in my
6 chambers.

7 (Whereupon the following discussion took place on
8 the record in camera:)

9 THE COURT: You're talking about the two ways to
10 prove pretext?

11 MR. MATESIC: That, and if you believe they
12 articulated --

13 THE COURT: Apparently that did not find its way
14 into my final charge. I'll take a look at it.

15 MR. MATESIC: Judge, I don't want the jury to get
16 the idea that I'm making meritless objections, procedural
17 objections. Would you be willing to explain to them what
18 the cause of this --

19 THE COURT: I will. I will.

20 All right, Mr. Matesic, is this the section
21 here (indicating)? Take a look at that and on the next
22 page. Is that what you are talking about?

23 MR. MATESIC: The highlighted section?

24 THE COURT: No, here (indicating).

25 MR. MATESIC: Yes. I still don't see the -- it

1 might be easier if I show you the language from the Circuit
2 case. Here you are right here. This is Smith versus
3 Borough of Wilkinsburg. "When a jury finds --"

4 (Mr. Matesic interrupted by reporter.)

5 MR. MATESIC: When a jury finds that the
6 employer's proper justifications for his actions is
7 pretextual, the jury is permitted, albeit not mandated, to
8 return a verdict in the Plaintiff's favor.

9 THE COURT: Don't we say that someplace in here?
10 In other words, we say you may, but you are not required to.

11 MR. PAWK: Yes, you do.

12 THE COURT: Where do I say that? I know it's in
13 here.

14 THE CLERK: Judge, it may have come out, because
15 it was part of the pretextual suggestions, and we said take
16 all this out.

17 THE COURT: Well, I have the original here.

18 THE CLERK: This was the draft this morning that
19 we had, and then we went through it, so it should be in
20 there. And, remember, we changed that.

21 THE COURT: Here it is. This was my original
22 draft. It says, if, after considering the evidence in light
23 of the principles as I have just outlined for you, you find
24 that the reasons stated by Cost for failure to hire as a
25 laborer was a true reason, you must find a verdict in favor

1 of Cost.

2 That's true. The way the thing is set up
3 right now, if you find by a preponderance that the reason as
4 given by Cost was not the real reason, you may, but are not
5 required to find in favor of Brown. Is that what you're
6 talking about?

7 MR. MATESIC: That's essentially the issue that
8 I'm talking about. What did I do with that case?

9 THE COURT: Right here (indicating).

10 MR. MATESIC: Now, the reason given by Cost --

11 THE COURT: I mean, I'll be happy to insert this,
12 if you want.

13 MR. MATESIC: Actually, what I would ask for is
14 this line right out of the Circuit case. If you find that
15 the employer's proper justifications is false, pretextual,
16 you are permitted, but you are not required, to return a
17 verdict in the Plaintiff's favor.

18 MR. PAWK: Isn't that what it says? We just read
19 it.

20 THE COURT: How is this different?

21 MR. MATESIC: First of all, you're putting a
22 preponderance issue in there. The Circuit does not include
23 that. And you limit it to the reason. This refers to the
24 general category of actions --

25 THE COURT: No, I'm going to give this. I'm happy

1 to do this. I am going to include this paragraph, just as
2 it sits, because this has been given hundreds of times, and
3 it's an accurate -- it's an accurate reflection of that.
4 And the Defendant isn't articulating any more than one
5 reason. So I'm going to -- let's see where we can insert
6 this.

7 (Discussion held off the record.)

8 THE COURT: It is right here. It should come
9 right before the discussion of intentional discrimination.
10 I think.

11 MR. MATESIC: What page are we on?

12 THE COURT: We're on Page 9.

13 MR. MATESIC: Now, the Fuentes two-prong test,
14 which we talked about earlier --

15 THE COURT: I thought -- I'm not trying to be
16 argumentative, but I thought an hour ago I asked you if you
17 had any objections to the charge, and you said no.

18 MR. MATESIC: Well, because you had also asked me
19 in the previous conference to just look at this one section
20 of the --

21 THE COURT: All right. Maybe my question wasn't
22 broad enough. But anyway, the two-prong -- by "here", you
23 mean on -- there are two ways in which Brown can show that
24 Cost stated reasons?

25 MR. MATESIC: Yes, that's it.

1 THE COURT: All right. Here is the -- we can talk
2 about -- here is the paragraph. Right there. Take a look
3 at that. And that is going to have to be retooled in the
4 context of where we are, because it's not a --

5 MR. PAWK: Judge, I apologize because we went
6 through this specifically here in chambers. We agreed to
7 strike that. Counsel agreed to that. Mr. Matesic agreed to
8 strike that too. It was agreed upon.

9 MR. MATESIC: Wait a second. We were rushing
10 around to get this charge done --

11 THE COURT: I would prefer to reach it on its
12 merits, rather than on the possibility that there had been a
13 miscommunication. So the point is here, weaknesses,
14 implausibilities, inconsistencies, that suggests that the
15 jury is still toying with the -- is still toying with the
16 idea as to whether the legitimate nondiscriminatory reason
17 is, in fact, legitimate or is it contextual.

18 MR. MATESIC: Correct.

19 THE COURT: You're giving away here more than if
20 you even -- if you thought about it, than you would. If
21 they found the prima facie case, they have already concluded
22 that the stated reason is false.

23 MR. MATESIC: That actually goes back to a point
24 which we disagreed about earlier. As I was explaining while
25 you were out in the office, I think the Court's concept of

1 the prima facie problem here is that the Court cannot
2 imagine a scenario in which the Plaintiff establishes all
3 four points of that prima facie case, and despite that, the
4 Defendant wins. That's --

5 THE COURT: I can imagine that scenario.

6 MR. MATESIC: You can?

7 THE COURT: I can. Sure. The scenario would be,
8 yeah, they lied, but they didn't lie because they were
9 gender-biased.

10 MR. PAWK: Second hurdle.

11 MR. MATESIC: I think that goes right to the point
12 we are just discussing. Just because they find on the four
13 issues, doesn't mean that we necessarily win.

14 THE COURT: No, it doesn't. It's as I thought I
15 told them here, they still are going to have to prove that
16 it's intentional discrimination.

17 MR. LUTZ: You tailored it to avoid confusion,
18 which is what our discussion was.

19 THE COURT: Here is the final. I say -- now, look
20 at my final charge on Page 9, if you would. And start the
21 second paragraph, and read the second paragraph and the
22 third paragraph and then tell me what you think is wrong
23 with that.

24 MR. LUTZ: Nothing.

25 THE COURT: Well, I know that's what you think.

1 MR. LUTZ: I know. But we have been through this
2 before.

3 MR. MATESIC: Actually, I think it's this second
4 sentence in the third paragraph. "Rather, Brown must show
5 both that the stated reason is false --"

6 THE COURT: "Rather, Brown must show both that the
7 stated reason is false and that the real reason for the
8 challenged employment decision was because of her sex."
9 That's precisely correct.

10 MR. MATESIC: And now the Fuentes, the two prongs
11 that we talked about before, that should go here. Because
12 those two prongs are it's either pretext, or the
13 discrimination was more likely to be explanation.

14 THE COURT: I agree with that. You know, the
15 jury -- except that -- except that by the time they get to
16 this analysis, they already will have passed on a prima
17 facie case. Do you know what I mean?

18 MR. MATESIC: Theoretically.

19 THE COURT: Then what sense does it make? They
20 already will have passed on it.

21 MR. MATESIC: Because under Fuentes, it's a more
22 favorable status. Fuentes is not discovered in this
23 discussion if it's separated from this portion of the
24 charge.

25 THE COURT: Wouldn't this make sense, that --

1 first of all, do we all agree that when we say, can show
2 that Cost's stated reason is pretext, it's just another way
3 of saying Cost's reason is wrong, is incorrect?

4 MR. MATESIC: Is false.

5 THE COURT: Is false. Okay.

6 MR. MATESIC: And you're reading from Page 10.

7 THE COURT: Yeah. But -- and up here we would
8 say, you can't prove intentional discrimination by showing
9 that a stated reason is false. You've got to say false and
10 the real reason is because of sex. Fine. You now want me
11 to charge a Fuentes --

12 MR. MATESIC: Fuentes is the law, Your Honor.

13 THE COURT: I know it is the law. But, you know,
14 you have to think outside the box. And the box that I'm
15 living in right now is a situation where if a jury -- this
16 is not a burden-shifting case anymore. Once you have -- all
17 the jury has to find, if they find there's a prima facie
18 case, is that -- that what they did was motivated by sex.
19 That's all they have to find. If they find that there's a
20 prima facie case. And if that's the case, why should I tell
21 them --

22 All right, this is what I'm going to do.
23 Flip back to the Page 8.

24 MR. PAWK: Are we on the third version, Judge?

25 THE COURT: We're on the final. Where in the

1 charge do I talk about your position, where I say, "It's the
2 Defendant's position that she didn't apply for the job."?

3 MR. PAWK: I think it's early.

4 THE CLERK: No, Judge, that was in the previous
5 draft when that was in the Fuentes burden shifting. That
6 was taken out because we --

7 THE COURT: I want you guys to go out in the
8 courtroom, and I'm going to get you when I'm ready for you.

9 MR. MATESIC: May I say one more thing?

10 THE COURT: No, you may not. This is only by the
11 grace of God that I'm taking this much time to do it,
12 because nine judges out of 10 would have said you're bound
13 by what you already put on the record.

14 MR. MATESIC: I am not addressing that issue at
15 all. I wanted to inform the Court. I don't want to incur
16 the Court's wrath if I go an hour. And I just wanted to put
17 that on the record.

18 THE COURT: In other words, will you incur the
19 Court's wrath if you go the hour? Is that what you're
20 asking me?

21 MR. MATESIC: No. I don't want to incur the
22 Court's --

23 THE COURT: As a practical matter, the way things
24 are going, it could very well end up you do your closing
25 tomorrow morning. That's the way it's going now.

1 MR. MATESIC: I don't have a problem with that.

2 (End of discussion in camera.)

3 (Whereupon the proceedings resumed in open court.)

4 THE COURT: Members of the jury, due to, first of
5 all, a legal matter of concern to all of us that we have
6 been addressing, and we don't have it quite ironed out yet,
7 but I will shortly -- the upshot of that is, is that there's
8 one more closing to go, and then my jury charge. My jury
9 charge typically takes about 35 minutes, and I do not keep
10 jurors here past much more than like 10 to 5:00, 5:00, which
11 means we can't squeeze in everything to finish this today.
12 And even if I could finish my charge to you, I would hate to
13 send you home before you had a chance to start deliberating.
14 Longhand way of saying that this case is going to end
15 tomorrow morning. That's just, of course, the way it is.

16 I'm going to ask you to come back at 9:00,
17 and you'll be deliberating tomorrow morning.

18 And as far as counsel is concerned, I'm going
19 to work on this matter, and then let me see counsel -- be
20 hereby 8:30 tomorrow morning -- some counsel be here by
21 8:30 tomorrow morning, and then we'll take it from there.
22 Don't talk -- remember not to talk about the case.

23

24 (Proceedings adjourned at 3:48 p.m.)

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